Supreme Court, U.S.
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No. 06-53

In The
Supreme Court of the United States

MR. JEFFREY F. JONES,

Petitioner,

v.

THE HONORABLE JANET R. BURNSIDE, JUDGE,

and

THE HONORABLE THOMAS J. MOYER, CHIEF JUSTICE,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This is a judicial disqualification Case, which presents the substantive due process issue of whether a party to state court litigation is entitled to a fair and impartial judge – one who has not received significant campaign contributions from an opposing party. Here, the Trial Court received at least $8,300 in campaign contributions from the Defendant Baker & Hostetler LLP, its Ohio PAC, and its partners, without disclosing the same to the Plaintiff in a multimillion dollar legal malpractice case (she refused to recuse herself, after the Plaintiff discovered this). The Chief Justice of the Ohio Supreme Court, who refused to disqualify the Trial Court, and who refused to recuse himself from the proceedings, received at least $26,900 from the same. As such, this Case also presents the procedural due process issue of whether a litigant in the Ohio Supreme Court is entitled to have a disqualification procedure to challenge justices thereof. Ohio, like all other forty-nine states as well as the federal courts, has a Code of Judicial Conduct modeled after the ABA's Model Code of Judicial Conduct. According to the 2000 U.S. Census, the per capita annual income in Ohio was $21,003.

1. Whether the failure of the State of Ohio (and all thirty-eight other states that elect their judges) to adopt ABA Model Code of Judicial Conduct Canon 3(E)(1)(e) (1999), which provides for disqualification and recusal related to campaign contributions by parties and their lawyers over a certain threshold, or its failure to adopt any other like standard, violates the Petitioner's Fourteenth Amendment substantive due process right to a fair and impartial trial judge and chief justice.

2. Whether the failure of the State of Ohio to provide a procedural mechanism or process for disqualifying an Ohio Supreme Court justice, when it provides a method for seeking disqualification of all other types of judges, violates the Petitioner's Fourteenth Amendment procedural due process right to be heard on his substantive due process right to a fair and impartial chief justice.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the underlying disqualification case of *In re Burnside (Jones v. Baker & Hostetler LLP)*, No. 06-AP-015 (Ohio Sup. Ct., reconsideration denied Apr. 11, 2006) (MOYER, C.J.), were the underlying Plaintiff, Mr. Jeffrey F. Jones, and the underlying Trial Judge, the Honorable Janet R. Burnside.

The parties to the underlying and pending legal malpractice case of *Jones v. Baker & Hostetler LLP, et al.*, No. CV-03-518194 (C.P. Cuyahoga, filed Dec. 30, 2003) (BURNSIDE, J.), are the underlying Plaintiff, Mr. Jeffrey F. Jones, and the underlying Defendants, Baker & Hostetler LLP, f.k.a. Baker & Hostetler, Paul E. Bennett, Esquire, Dale A. Bradford, Esquire, Gary L. Bryenton, Esquire, John M. Gherlein, Esquire, Catherine M. Kilbane, Esquire, Hudak, Shunk & Farine Co., L.P.A., f.k.a. Hudak & Shunk Co., L.P.A., and Laura F. Shunk, Esquire.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Mr. Jeffrey F. Jones, respectfully prays that this Supreme Court of the United States grant a writ of certiorari to review the Ohio Supreme Court's refusal to disqualify the Trial Court from presiding over his underlying and pending legal malpractice case against the Defendants.[1]

OPINIONS BELOW

In the underlying disqualification case of *In re Burnside* (*Jones v. Baker & Hostetler LLP*), No. 06-AP-015 (Ohio Sup. Ct., reconsideration denied Apr. 11, 2006) (MOYER, C.J.), the Chief Justice of the Ohio Supreme Court denied the Plaintiff's, his Counsel's, and his Expert Witness' Affidavits of Disqualification on March 17 & 21, 2006, unreported to date (reprinted *infra* App. 1-7), as well as the Plaintiff's Motion for Clarification and/or Reconsideration of his Affidavits of Disqualification, *or in the alternative*, his Motion to Continue the Stay Pending a Petition for Writ of Certiorari, on April 11, 2006, unreported to date (reprinted *infra* App. 8-9).

In the underlying and pending legal malpractice case of *Jones v. Baker & Hostetler LLP, et al.*, No. CV-03-518194 (C.P. Cuyahoga, filed Dec. 30, 2003) (BURNSIDE, J.), the Trial Court denied the Plaintiff's Motion for Recusal on February 9, 2006, unreported (reprinted *infra* App. 14).

JURISDICTION OF THIS COURT

As just stated, the Ohio Supreme Court denied the Plaintiff's Motion for Clarification and/or Reconsideration

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[1] In this Case, the Honorable John Paul Stevens, Associate Justice of the United States and Circuit Justice for the Sixth Circuit, denied the Petitioner's Application to Stay Proceedings in the Underlying Case on May 22, 2006, and this Court denied the Petitioner's Renewed Application to Stay those Proceedings on June 26, 2006, after reference thereto by the Honorable Ruth Bader Ginsburg, Associate Justice of the United States, Docket No. 05A1067. If this Court grants the writ, the Petitioner will ask this Court to reconsider the stay issue.

of his Affidavits of Disqualification, on April 11, 2006, unreported to date (reprinted *infra* App. 8-9), so this Petition is timely filed as of July 10, 2006. U.S. SUP. CT. R. 13.3.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any . . . right [or] privilege . . . is specially set up or claimed under the Constitution. . . .").

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Where the following provisions are reprinted in either the text or footnotes, *see supra* Table of Authorities, the quotation lengths have been excluded from the determination of the page limitation of this Petition pursuant to U.S. SUP. CT. R. 33.1(d):

- Federal provisions: U.S. CONST. amend. XIV, § 1; 28 U.S.C. § 144; 28 U.S.C. § 455; 28 U.S.C. § 1257;
- Alabama provisions: ALA. CODE §§ 12-24-1; ALA. CODE §§ 12-24-2; and
- Ohio provisions: OHIO CONST. art. I, § 16; OHIO CONST. art. IV, § 5(C); OHIO REV. CODE § 2101.39; OHIO REV. CODE § 2501.13; OHIO REV. CODE § 2701.03; OHIO REV. CODE § 2701.031; OHIO CODE JUD. CONDUCT Canon 2; OHIO CODE JUD. CONDUCT Canon 3; OHIO CODE JUD. CONDUCT Canon 7; OHIO R. GOV. JUD. I, § 1; OHIO R. GOV. JUD. II, § 4.

STATEMENT OF THE CASE

A. Underlying Legal Malpractice Case –

The Plaintiff, Mr. Jeffrey F. Jones, previously filed and voluntarily dismissed without prejudice his complaint against the defendants, Baker & Hostetler LLP, f.k.a. Baker & Hostetler, and Paul E. Bennett, Esquire, in the

underlying Case of *Jones v. Baker & Hostetler LLP, et al.*, No. CV-03-518194 (C.P. Cuyahoga, filed Dec. 30, 2003, voluntarily dismissed Oct. 26, 2005) (BURNSIDE, J.) ("Legal Malpractice Case I"), and he refiled these and additional claims in the case of *Jones v. Baker & Hostetler LLP, et al.*, No. CV-05-11-6529 (C.P. Summit, filed Nov. 4, 2005, transferred Mar. 9, 2006) (COSGROVE, J.) ("Legal Malpractice Case II"), against the defendants, Baker & Hostetler LLP, f.k.a. Baker & Hostetler, and Paul E. Bennett, Esquire, Dale A. Bradford, Esquire, Gary L. Bryenton, Esquire, John M. Gherlein, Esquire, Catherine M. Kilbane, Esquire, Hudak, Shunk & Farine Co., L.P.A., f.k.a. Hudak & Shunk Co., L.P.A., and Laura F. Shunk, Esquire.

All of these Defendants, with the exception of Paul E. Bennett, Esquire (who both answered and moved to dismiss), moved the Summit County Court of Common Pleas to transfer the Legal Malpractice Case II back to Cuyahoga County on the basis that it was a "refiled" case, even though none of those movants were parties in the first lawsuit (except for Baker & Hostetler LLP). On March 9, 2006, the Summit County Court of Common Pleas transferred the entire lawsuit (including Paul E. Bennett, Esquire) back not just to Cuyahoga County but to the docket of Judge Janet R. Burnside and consolidated it with the Legal Malpractice Case I, which was effectuated by the Summit County Clerk on March 16, 2006, and by the Cuyahoga County Clerk on March 22, 2006. The Summit County Court of Common Pleas denied the Plaintiff's Motion for Reconsideration on March 29, 2006. All of this was timely communicated to the Ohio Supreme Court throughout the disqualification proceedings discussed below.

B. Underlying Recusal Motion –

On February 1, 2006, in the Legal Malpractice Case I, and pursuant to OHIO CODE JUD. CONDUCT Canon 3(E), the Plaintiff moved the Trial Court to recuse itself, because the Trial Court's "impartiality might reasonably be questioned" therein. *Id.* at 3(E)(1).

The basis was that (1) the Trial Court had failed to disclose the extraordinary political contributions made to it by the Defendants and their partners, that (2) the Trial Court had taken a personal interest in the underlying case, that (3) the Defendants and their partners were behaving as if they had purchased special favor with the Trial Court, where one of the Defendants had actually stated in sworn testimony that the Trial Court would issue a declaratory judgment in his favor at the then upcoming Trial, and that (4) the Trial Court had made numerous rulings in the underlying case that were arbitrary and capricious, any and all of which would lead any objective observer to conclude that the Trial Court's "impartiality might reasonably be questioned" therein. *Id.*

On February 6, 2006, Paul E. Bennett, Esquire opposed that recusal motion, and on February 9, 2006, the Plaintiff filed a Motion for Leave to File *Instanter* a Reply in Support thereof, which the Trial Court denied as moot on February 14, 2006, after having apparently denied the recusal motion the same day as the Reply was filed on February 9th. Importantly, Paul E. Bennett, Esquire did not contest any of the facts upon which the Plaintiff was moving for recusal, the Trial Court denied that recusal motion without opinion, and the Trial Court has now admitted that it did not even bother to read the Plaintiff's Reply.

C. Facts Before the Trial Court on Recusal –

In his Motion for Clarification and/or Reconsideration of his Affidavits of Disqualification, the Plaintiff summarized the facts before the Trial Court on Recusal in part as follows:

ii. Political Donations & Gifts by the Defendants –

> In this Case, [the Trial] Court has accepted huge political contributions from the Defendants without disclosing the same to the Plaintiff. For instance, in [the Trial] Court's 2000 campaign for its current term, it received at least $1,000 from the Baker & Hostetler LLP Ohio PAC, according to its own campaign financial reports, excerpts of which are attached hereto and incorporated

herein by reference. This made B&H [the Trial] Court's fourth largest contributor. Since the Cuyahoga County Board of Elections does not keep records for [the Trial] Court's prior county campaigns, the Plaintiff has no idea what previous contributions may have been made by B&H to [the Trial] Court. Likewise, [the Trial] Court is just entering into its fundraising for its next re-election campaign, so the Plaintiff has no idea what further contributions either have been – or will be – received by [the Trial] Court from B&H.

In regards to [the Trial] Court's 2002 campaign for Ohio Supreme Court, B&H's Ohio PAC gave this Court $5,000 and at least three (3) B&H partners gave this Court an additional $300, and this information is attached hereto and incorporated herein by reference. In that campaign, [the Trial] Court raised 69.09% of its contributions from lawyers and lobbyists, and this information is also attached hereto and incorporated herein by reference. Statewide, B&H and its partners contributed almost $77,000 to Ohio political candidates just in 2002, and this information is attached hereto and incorporated herein by reference.

According to the Federal Election Commission, the following B&H partners, who are relevant herein, made the following contributions to B&H's Political Action Committee: (1) Mr. Bennett contributed $900; (2) Mr. Bryenton contributed $8,900; (3) Mr. Gherlein contributed $2,200; (4) Ms. Kilbane contributed $1,400. In addition, B&H's in-house counsel have made the following similar contributions: (1) Ms. Newborn contributed $2,700; and (2) Mr. Vargo contributed $3,400. For the last four bienniums, B&H has dispersed a total of $462,815 to political candidates, nationally, through its federal PAC, which is in addition to the money donated by its local PACs and its partners. This information is all attached hereto and incorporated herein by reference.

iii. B&H's Stated Motivations –

During this same time period, B&H partner Jose C. Feliciano, Esquire, then-Cleveland Bar Association President, and a limited partner with the Plaintiff in Sarasota Restaurants, L.P., stated that he "believe[d] [that] lawyers give money to gain friends on the court." Jose C. Feliciano, *Merit Selection Would Increase Vote Confidence*, CLEVELAND PLAIN DEALER, Mar. 29, 2001, at B-9, which is attached hereto and incorporated herein by reference.

In accordance with Mr. Feliciano's stated views, B&H was the sixth largest contributor to Chief Justice Moyer in his 2004 election, after giving some $15,550 to him, and B&H gave a whopping total of $28,600 to all 2004 Ohio Supreme Court candidates. *See* Catherine Turner & Brandi Whetstone, *Election 2004: Campaign Contributions to Candidates for Chief Justice and Justice of the Ohio Supreme Court* (Ohio Citizen Action Education Fund), which is attached hereto and incorporated herein by reference. Statewide, B&H and its partners contributed almost $53,820 to Ohio political candidates just in 2004, and this information is attached hereto and incorporated herein by reference.

As bragged to by B&H, it is one of the top twenty-four (24) "'go to' Power Elite U.S. law firms" in the country, and it is the largest locally-based law firm in Cleveland, since Jones Day claims not to be based anywhere. CRAIN'S CLEVELAND BUSINESS, Dec. 26, 2005, at 38-39, which is attached hereto and incorporated herein by reference. Apparently, money, power and politics are related, when it comes to B&H.

iv. The Chief Justice Weighs In –

Last week [1/25/06], Chief Justice Moyer testified before the Ohio House Judiciary Committee on H.B. 266, wherein he stated that "[a] majority of citizens believe campaign donations influence the behavior of a judicial candidate if

> he or she should win. How can we expect citizens to believe otherwise when more than seven million dollars was raised by candidates in three of the Supreme Court races in 2004?" Chief Justice Thomas J. Moyer, Testimony on H.B. 266 before the House Judiciary Committee (Jan. 25, 2006), which is attached hereto and incorporated herein by reference.

Plaintiff's Motion for Clarification and/or Reconsideration, at 7-10 (reprinted *infra* App. 26-31).

The Plaintiff further summarized the facts before the Trial Court on Recusal in part as follows:

> . . . [PEB] does not deny the previously undisclosed but longstanding relationship between [the Trial] Court and his former law firm of [B&H], of which he was a partner until 2002. As shown by the spreadsheet delineating all of the [B&H] Ohio PAC contributions from 1992 through 2005, which data was obtained from the Ohio Secretary of State, and which is attached hereto and incorporated herein by reference, [the Trial] Court was the third-largest recipient of contributions from B&H over the last fifteen (15) years; and when B&H's partners are included, this Court has received at least $8,300 from B&H and its partners over the years. In fact, B&H has made financial contributions to this Court *longer* than it has to any other judge listed on its disclosure reports. As previously briefed, in [the Trial] Court's last two (2) elections, B&H was among [the Trial] Court's very largest contributors. As such, there can be no dispute that [the Trial] Court has a long-standing and very important relationship with B&H, which can be expected to continue into this Court's newest campaign cycle.

Plaintiff's Motion for Clarification and/or Reconsideration, at 10-11 (footnote omitted) (reprinted *infra* App. 31-33).

D. Underlying Disqualification Case –

On February 17, 2006, the Plaintiff filed with the Ohio Supreme Court Affidavits of Disqualification from himself,

his undersigned counsel, and his judicial disqualification expert witness, Richard E. Flamm, Esquire. In addition to the facts summarized above, the facts relating to all of this are set-out in more detail in the Appendix, *infra* App. 22-45.[2]

The Plaintiff summarized the Trial Court's admissions on disqualification as follows:

> The Trial Court did not specifically deny that (1) it had failed to disclose the extraordinary political contributions made to it by the Defendants and their partners, that (2) it had taken a personal interest in the underlying Case, that (3) the Defendants and their partners were behaving as if they had purchased special favor with the Trial Court, where one of the Defendants had actually stated in sworn testimony that the Trial Court would issue a declaratory judgment in his favor at the then upcoming Trial, and that (4) it had made numerous rulings in the underlying Case that were arbitrary and capricious, any and all of which would lead any objective observer to conclude that the Trial Court's "impartiality might reasonably be questioned" therein. *Id.*

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[2] On February 21, 2006, the Ohio Supreme Court wrote to the Trial Court and requested that it respond to these Affidavits; however, the Ohio Supreme Court did not copy the Plaintiff on this letter, and the Plaintiff did not learn of it, and receive a fax of the same from the Ohio Supreme Court, until March 1, 2006. On February 28, 2006, the Plaintiff filed a Supplemental Affidavit from his counsel, which was technical in nature, and merely provided originals of signature pages to two (2) of the Affidavits, and which disclosed updated docket information in the underlying case. On March 13, 2006, the Trial Court filed its response with the Ohio Supreme Court, wherein it did not specifically deny any of the bases for disqualification or the facts underlying these bases. The Trial Court did not mail that response to the Plaintiff until March 15, 2006, which the Plaintiff's counsel received on March 16, 2006. The Plaintiff, himself, called and received a fax of the same from the Ohio Supreme Court on March 15, 2006. On March 16, 2006, the Plaintiff's counsel faxed the Ohio Supreme Court a request to respond to the Trial Court's letter until Monday, March 20, 2006. On March 17, 2006, the Plaintiff faxed his Reply in Support of his Affidavits of Disqualification to the Ohio Supreme Court, which was filed on March 21, 2006.

Instead, in its response herein, the Trial Court admitted the following:

1. In paragraph fourteen (¶14) of its letter that "members of the public may assume or suspect a judge's decisions in individual cases are driven by campaign contributions";
2. In paragraph sixteen (¶16) of its letter that it "appreciate[s] that members of the public may assume or suspect a judge's decisions in individual cases are driven by campaign contributions"; and
3. In paragraph nineteen (¶19) of its letter that it "do[es] not care whether this [C]ase stays on my docket or it is removed. There are advantages and disadvantages to either action."

Plaintiff's Motion for Clarification and/or Reconsideration, at 13 (reprinted *infra* App. 36); *see also id.* at 13-18 (summarizing the Trial Court's omissions) (reprinted *infra* App. 37-45).

On March 17, 2006, the Ohio Supreme Court denied the Plaintiff's Affidavits of Disqualification (reprinted *infra* App. 1-5). On March 21, 2006, the Ohio Supreme Court treated the Plaintiff's Reply as a motion for reconsideration and denied the same (reprinted *infra* App. 6-7). On April 7, 2006, the Plaintiff faxed his Motion for Clarification and/or Reconsideration of his Affidavits of Disqualification, *or in the alternative*, his Motion to Continue the Stay Pending a Petition for Writ of Certiorari, which was filed on April 11, 2006, and denied that same day by the Ohio Supreme Court (reprinted *infra* App. 8-9).

E. The Motion for Clarification Illustrates the Manipulation of the Factual Record on Disqualification –

Surprisingly, almost none of the above appears in the Ohio Supreme Court's Judgment Entries denying disqualification below (reprinted *infra* App. 1-9), and, in fact, the Chief Justice of the Ohio Supreme Court omitted from the same almost all of the relevant facts relied upon by the

Plaintiff, which the Plaintiff noted in his Motion for Clarification and/or Reconsideration as follows:

> This Court was required to explain its reasoning for denying the Plaintiff's Affidavits of Disqualification, OHIO CONST. art. IV, § 2(C), yet as recited above, this Court omitted almost all of the material facts set-forth by the Plaintiff, which does not allow a future reader of this Court's Opinion to know what the factual basis was for the Plaintiff's Affidavits, and which does not allow the Plaintiff or a future reader of the same to know how this Court actually reached its conclusion that the Trial Court should not be disqualified, which is patently unfair to the Plaintiff.
>
> Specifically, the Plaintiff presented evidence that (1) the Trial Court had failed to disclose the extraordinary political contributions made to it by the Defendants and their partners, that (2) the Trial Court had taken a personal interest in the underlying Case, that (3) the Defendants and their partners were behaving as if they had purchased special favor with the Trial Court, where one of the Defendants had actually stated in sworn testimony that the Trial Court would issue a declaratory judgment in his favor at the then upcoming Trial, and that (4) the Trial Court had made numerous rulings in the underlying Case that were arbitrary and capricious, any and all of which would lead any objective observer to conclude that the Trial Court's "impartiality might reasonably be questioned" therein, all of which was unrebutted by the Trial Court, yet this Court did not specifically describe in its Opinion the full extent of the Plaintiff's proof. . . .
>
> . . .
>
> Likewise, this Court omitted any detailed discussion of the allegations of the Plaintiff's and his Counsel's Affidavits. Even worse, this Court quoted the Plaintiff's Expert Witness' Affidavit out-of-context to make it appear as if Expert Flamm actually agreed with this Court's conclusion, when he did not.

> This Court omitted any discussion of this Court's, the Trial Court's, or even B&H's past statements about campaign contributions, all of which are material facts.
>
> Finally, this Court omitted the Trial Court's admissions made in its Response, which were material. . . . This Court also avoided discussing any of the omissions by the Trial Court. . . .

Plaintiff's Motion for Clarification and/or Reconsideration of his Affidavits of Disqualification, at 25-27 (reprinted *infra* App. 54-58).

Likewise, the Ohio Supreme Court's Judgment Entries denying disqualification below ignored the Chief Justice's own recusal issue, as if it did not exist. Plaintiff's Motion for Clarification and/or Reconsideration of his Affidavits of Disqualification, at 27-31 (reprinted *infra* App. 58-62).

F. The Raising of the Federal Issues Below –

The constitutional issues raised herein are implicit in the entire recusal and disqualification process below, but they were specifically raised in detailed argument in the Plaintiff's Motion for Clarification and/or Reconsideration of his Affidavits of Disqualification. For instance, the substantive due process argument was raised throughout pages 19-37 (reprinted *infra* App. 46-70), and the procedural due process argument was raised at pages 27-37 (reprinted *infra* App. 58-70). The Ohio Supreme Court's Judgment Entries denying disqualification below (reprinted *infra* App. 1-9) did not acknowledge or address either of these issues.

REASONS FOR GRANTING THE PETITION

I. This Court's Judicial Free Speech Case of *Republican Party of Minnesota v. White* Has Created Havoc Nationwide in Regards to the Several States' Ability to Enforce their Codes of Judicial Conduct, and the Only Way to Correct this Imbalance Is to Make Clear that with Increased Judicial Speech Comes the Increased Duty for Recusal and Disqualification in Order to Protect Litigants' Due Process Rights as well as to Guard against Further Erosion of the Public's Lack of Confidence in the Judiciary –

In June of 2002, this Court ruled that a provision of Minnesota's Code of Judicial Conduct, which prohibited a candidate for judicial office from discussing his or her views on a political issue, violated the First Amendment using a strict scrutiny analysis. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

On remand from this Court, the Eighth Circuit Court of Appeals struck down Minnesota's political activities canons, which prohibited judges and judicial candidates from engaging in partisan political activity, but which permitted them to speak at non-political party gatherings. The court also held that the state's solicitation clause, which prohibited judges and judicial candidates from personally soliciting campaign contributions (but allowed campaign committees to do so on behalf of the candidates), was unconstitutional to the extent that it prohibited candidates from signing solicitation letters and making campaign appeals before large groups. 416 F.3d 738 (8th Cir. 2005) (*en banc*), *cert. denied sub nom. Dimick v. Republican Party of Minnesota*, 126 S.Ct. 1165 (2006).

As catalogued by the Brennan Center for Justice at New York University School of Law,[3] the effect of *White* on

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[3] Catalogue available at www.brennancenter.org/programs/dem_fc_canons_summaries.html.

the several states' ability to enforce their codes of judicial conduct has been devastating:

For instance, in *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), *reh'g denied en banc*, 57 Fed. Appx. 416 (11th Cir. 2003), the Eleventh Circuit Court of Appeals found two constitutional defects in Georgia's canon against making false or misleading statements in a judicial campaign: the canon covered false statements made negligently, rather than requiring knowledge of falsity or reckless disregard for truth or falsity; and it covered statements that were literally true but misleading. The court also struck down a rule prohibiting judicial candidates from personally soliciting campaign contributions.

Likewise, in *Smith v. Phillips*, No. CIV.A.A-02CV111JRN, 2002 WL 1870038 (W.D. Tex. Aug. 6, 2002), a federal district court struck down a Texas regulation that it found indistinguishable from the Announce Clause invalidated in *White*.

Similarly, in *North Dakota Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021 (D.N.D. 2005), an organization that publishes information about judicial candidates and their views challenged several provisions of North Dakota's canons after several candidates had refused to answer questions on questionnaires the organization circulated. The federal district court held that the state's Pledges or Promises and Commit Clauses violated the First Amendment, because they forbid the same types of speech as the Announce Clause struck down in *White*. However, the court upheld the state's recusal rules, finding that they are narrowly tailored to serve the compelling state interest in judicial impartiality.

Finally, in *Alaska Right to Life Political Action Committee v. Feldman*, 380 F. Supp. 2d 1080 (D. Alaska 2005), a political action committee had challenged canons that prevented judicial candidates from responding to questionnaires or surveys regarding their views, and relying on the just-mentioned North Dakota district court decision, the federal district court struck down Alaska's Pledges or Promises and Commit Clauses, but upheld its recusal provisions.

Ohio, at first, issued guidelines as to how to deal with *White*, OHIO SUP. CT., Bd. of Comm'rs on Grievances and

Discipline, Informal Op. 8 (2002), and then by an order dated January 28, 2005, it ceased enforcing Canons 7(B)(3)(a)(iv) ("From the day on which he or she becomes a judicial candidate through the day of the primary election, identify himself or herself in person or in advertising as a member of or affiliated with a political party."), 7(B)(3)(b) ("After the day of the primary election, a judicial candidate shall not identify himself or herself in advertising as a member of or affiliated with a political party."), and 7(D)(2) ("Use the term 'judge' when a judge is a candidate for another judicial office and does not indicate the court on which the judge currently serves"), of the Ohio Code of Judicial Conduct.

Other states have simply amended their codes rather than fight the issue according to one judicial observer:

> The history in North Carolina also demonstrates that such attacks may come in the guise of "reforms" to the canons. North Carolina not only turned the political activity regulations on their heads – changing the basic canon from "A judge should refrain from political activity inappropriate to his judicial office" to the current "A judge may engage in political activity consistent with his status as a public official" – but also eliminated the Pledge or Promise Clause and the ban on candidates' personally soliciting campaign contributions. The state Supreme Court did all of this, moreover, without giving the public any notice or opportunity to comment on the changes; an order simply appeared out of the blue on April 2, 2003, announcing the new rules.
>
> Other states have also amended their canons since *White* was decided, though none has done so as drastically as North Carolina. In some cases, these changes may weaken the canons, even if that is not the intention. For example, the Georgia Supreme Court has dropped the Pledge or Promise Clause and the ban on statements that "appear to commit" a candidate under the Commit Clause.
>
> The ABA itself is undertaking a comprehensive review of its Model Code of Judicial Conduct, and it

> has already approved a change that combines the Pledge and Promise Clause and the Commit Clause into one clause, modifying them somewhat in the process. More states are likely to consider changes, some in a good-faith effort to comply with *White*, others in a cynical attempt to exploit *White* by pushing through unnecessarily broad revisions. Defenders of judicial impartiality and independence must encourage their high courts to use an open revision process and be prepared to participate actively during any available comment period.

J.J. GLASS, AFTER *WHITE*: DEFENDING AND AMENDING CANONS OF JUDICIAL ETHICS 4 (Brennan Ctr. for Justice at NYU Law School 2004) (citations omitted).[4]

> The efforts by the American Bar Association are discussed *infra* Part III.
>
> The examples go on and on, but a recent article showcases the problem:
>
> [A] conservative advocacy group led by Tennessee State Senator David Fowler has asked the state's Supreme Court and appellate court judges who will sit for retention elections this August to take positions on controversial political issues. A survey sent to the judicial candidates by the Family Action Council asked candidates whether they believe the state constitutional [sic] contains a "right" to same-sex marriage, requires public funding for abortions, and permits teaching both evolution and "alternative theories." Supreme Court Chief Justice Frank Drowota warned that the surveys are "[r]eally asking them (judicial candidates) to address a viewpoint, and they will have basically prejudged future cases or at least given an appearance that they have prejudged it." *He recently headed a Tennessee Bar Association panel that created a voluntary "Code of Conduct," which includes an agreement "not to announce positions on matters that might come before the court."*

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[4] Paper available at www.brennancenter.org/resources/ji/ji4.pdf.

Andy Sher, *Survey Digs into Judges' Views*, CHATTANOOGA TIMES FREE PRESS, Jun. 21, 2006 (emphasis added), *contained in* Court Pester E-lert, Jun. 27, 2006 (Brennan Ctr. for Justice at NYU Law School).[5]

The regrettable part of all of this is that this Court did not have to use a strict scrutiny analysis in *White*, because judges are not politicians, by definition, regardless of the manner upon which they attain the bench. Had this Court simply used a commercial-free-speech-type level of review, none of the above would have happened. Moreover, were this Court to truly believe that judges, who are elected, were politicians, then it would have been compelled to find an elected judiciary unconstitutional on substantive due process grounds.

II. Introduction to Due Process –

A. Procedural Due Process Right to a Hearing –

The proceedings below are subject to the parameters of federal procedural due process. Specifically, "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

> The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.
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> . . .
>
> [T]o determine whether due process requirements apply in the first place, we must look not

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[5] Newsletter available http://brennancenter.org/programs/pester/pages/view_elerts.php?search_text=survey+digs&month_start=01-01-&year_start=2000&month_end=12-31-&year_end=2006&category_id=&image.x=0&image.y=0; newspaper story available at www.tfponline.com/QuickHeadlines.asp?sec=1&URL=http%3A%2F%2Fepaper%2Ewehco%2Ecom%2FWebChannel%2FShowStory%2Easp%3FPath%3DChatTFPress%2F2006%2F20%26ID%3DAr00101.

> to the "weight" but to the *nature* of the interest at stake. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.
>
> . . .
>
> Certain attributes of "property" interests protected by procedural due process [have] emerge[d]. . . . To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. [S/]He must have more than a unilateral expectation of it. [S/]He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 569-77 (1972) (footnotes and citations omitted); *see also Leis v. Flynt*, 439 U.S. 438, 441 (1979) ("A claim of entitlement under state law, to be enforceable, must be derived from statute or legal rule or through a mutually explicit understanding." (citation omitted)).

In this light, it should come as no surprise that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (citing *Martinez v. California*, 444 U.S. 277, 281-82 (1980); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

> This conclusion is hardly a novel one. The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property

> or as plaintiffs attempting to redress grievances. . . . [F]or example – where a plaintiff's claim had been dismissed for failure to comply with a trial court's order – the Court read the "property" component of the Fifth Amendment's Due Process Clause to impose "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." Similarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]."

Id. at 429-30 (citations and footnote omitted); *cf. id.* at 430 n.5 (discussing by analogy the Court's decisions on the right to access the courts in instances where fundamental rights are involved).

Finally, "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Id.* at 432 (alterations in original; citations omitted). The test in regards to "the timing and nature of the required hearing 'will depend on appropriate accommodation of the competing interests involved.' These include the importance of the private interest and the length or finality of the deprivations, the likelihood of governmental error, and the magnitude of the governmental interests involved." *Id.* at 434 (citations and footnote omitted).

B. Substantive Due Process Right to a Fair and Impartial Tribunal –

As a matter of federal substantive due process, it is written in stone that the Petitioner was entitled to a fair and impartial trial and tribunal in the underlying disqualification and legal malpractice cases. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Gibson v. Berryhill*, 411

U.S. 564 (1973); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *In re Murchison*, 349 U.S. 133 (1955); *Tumey v. Ohio*, 273 U.S. 510 (1927).

Specifically, a "fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." *In re Murchison*, 349 U.S. at 136. A fair trial means that the judge is "require[d] to be impartial in weighing the evidence presented before him [or her]. . . ." *Id.* at 138. "Every procedure which would offer a possible temptation to the average [wo/]man as a judge to forget the burden of proof required . . . or which might lead him[/her] not to hold the balance nice, clear and true between . . . [the parties] denies . . . [them] due process of law." *Tumey*, 273 U.S. at 532.

Consequently, the State of Ohio has vested in the Petitioner, and in every other litigant, a right to an impartial tribunal by making the Ohio Code of Judicial Conduct and the Ohio Code of Professional Responsibility binding upon the judiciary. OHIO R. GOV. JUD. I, § 1.[6] This right is, of course, also enveloped by state procedural due process. OHIO CONST. art. I, § 16.[7] In Ohio, it is

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[6] This section provides as follows:

> The Code of Professional Responsibility, as adopted by the Supreme Court on October 5, 1970 and set forth in 23 Ohio State 2d Reports, as amended, shall be binding upon all persons admitted to practice law in Ohio. The willful breach of the Code by a Justice, judge, or candidate for judicial office shall be punished by reprimand, suspension, disbarment, or probation as provided in Gov. Jud. R. II and Gov. Bar R. V. The Code of Judicial Conduct, as adopted by the Supreme Court, effective December 20, 1973, and set forth in 36 Ohio State 2d Reports, as amended, shall be binding upon all judicial officers of this state and candidates for judicial office. The willful breach of the Code shall be punished by reprimand, suspension, disbarment, or probation as provided in Gov. Jud. R. II and Gov. Bar R. V, or by retirement, removal, or suspension from office, as provided in Gov. Jud. R. III.

[7] This section provides as follows:

> All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought

(Continued on following page)

mandatory that "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." OHIO CODE JUD. CONDUCT Canon 2. In Ohio, it is mandatory that "[a] judge shall perform the duties of judicial office impartially and diligently." *Id.* at Canon 3. In Ohio, even the appearance of impropriety supports disqualification. *Id.* at Canon 3(E)(1); *see, e.g.*, *Volodkevich v. Volodkevich*, 35 Ohio St. 3d 152, 518 N.E.2d 1208 (1988) (same); *see generally* 22 OHIO JUR. 3D *Courts & Judges* §§ 113-126 (West 2006) (discussing purpose and grounds for disqualification).

Judicial ethics commentators have stated that "favoritism toward one of the parties to a suit is what constitutes disqualifying bias or prejudice." JEFFREY M. SHAMAN, STEVEN LUBET & JAMES J. ALFINI, JUDICIAL CONDUCT & ETHICS § 4.04 (3rd ed. 2000 & Supp. 2004) (citations omitted); *see also id.* at ch. 4 (discussing judicial disqualification and conflicts of interest); *see generally* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION (1996 & Supp. 2005) (only comprehensive treatise on entire topic).

III. The Failure of the State of Ohio (and All Thirty-Eight Other States that Elect their Judges) to Adopt ABA Model Code of Judicial Conduct Canon 3(E)(1)(e) (1999), Which Provides for Disqualification and Recusal Related to Campaign Contributions by Parties and their Lawyers Over a Certain Threshold, or Its Failure to Adopt Any Other Like Standard, Violates the Petitioner's Fourteenth Amendment Substantive Due Process Right to a Fair and Impartial Trial Judge and Chief Justice –

This is not an ordinary judicial disqualification Case. Rather, this Case presents the important substantive due process issue of whether a party to state court litigation is

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against the state, in such courts and in such manner, as may be provided by law.

entitled to a fair and impartial judge and chief justice – one who has not received significant campaign contributions from an opposing *party*.

Here, the Trial Court received at least $8,300 in campaign contributions from the Defendant Baker & Hostetler LLP, its Ohio PAC, and its partners, without disclosing the same to the Plaintiff in a multimillion dollar legal malpractice case (she refused to recuse herself, after the Plaintiff discovered this).

The Chief Justice of the Ohio Supreme Court, who refused to disqualify the Trial Court, and who refused to recuse himself from even hearing the affidavits of disqualification below, received at least $26,900 from the Defendant, its PAC, and its partners, the majority of which was given in his last election, where some thirty-two of its partners made contributions to him.[8]

Ohio, like all other forty-nine states as well as the federal courts, has a Code of Judicial Conduct modeled after the ABA's Model Code of Judicial Conduct.

Ohio Judicial Canon 3(E) (Disqualification) provides as follows:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> > (a) The judge has a personal bias or prejudice concerning a party or a party's lawyer,

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[8] In 2004, the campaign contribution limits for law firms to supreme court candidates was $5,500. OHIO CODE JUD. CONDUCT Canon 7(C)(5)(a)(ii) (2004). In Ohio, "[a] partnership is an aggregate of individuals and does not constitute a separate legal entity." Arpadi v. First MSP Corp., 68 Ohio St. 3d 453, 628 N.E.2d 1335 (1994) (Syllabus at ¶1). So either the Defendant Baker & Hostetler LLP illegally gave money as an entity to Chief Justice Moyer, or it illegally exceeded the campaign contribution limits for firms, since all of its partners' contributions would have to be aggregated, since the partnership is nothing more than the aggregate of the individual partners.

or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) The judge served as a lawyer in the matter in controversy, a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning the matter;

(c) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;

(d) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Has acted as a judge in the proceeding;

(iv) Is known by the judge to have an economic interest that could be substantially affected by the proceeding;

(v) Is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge shall keep informed about the judge's personal fiduciary and economic interests and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

OHIO CODE JUD. CONDUCT Canon 3(E); *cf. id.* at 3(G) (disqualification of justices of the Ohio Supreme Court).[9]

This Canon is modeled after the ABA Model Code of Judicial Conduct, which provides additionally that a judge should disqualify herself, when: "the judge knows or learns by means of a timely motion that a party or a party's lawyer has within the previous [***] year[s] made aggregate* contributions to the judge's campaign in an amount that is greater than [[[$***] for an individual or [$***] for an entity]]] [[is reasonable and appropriate for an individual or an entity]]." ABA MODEL CODE JUD. CONDUCT Canon 3(E)(1)(e) (2003) (footnote omitted; outside asterisks indicate defined terms by the ABA) (provision was first adopted by the ABA in 1999); *see also* ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 245-46 (2004) (discussing 1999 amendment that resulted in Canon 3(E)(1)(e)) [hereinafter ANNOTATED MODEL CODE]. Under the Final Draft Report, dated December 14, 2005, of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, this provision is preserved as new Canon 2, Rule 2.12(A)(4).[10] This standard may have had its antecedent in an earlier law review article. Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STANFORD L. REV. 449 (1988) (first article to propose a recusal/disqualification standard based upon amount of campaign contributions).

Ohio Judicial Canon 3(F) (Remittal of Disqualification) provides as follows:

> If, following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, jointly request that the judge should remit his or her disqualification, the judge may approve and participate in the proceeding. The request and approval shall be incorporated in the record of the proceeding.

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[9] The commentary to this section is reprinted *infra* App. 87.

[10] Report available at www.abanet.org/judicialethics.

OHIO CODE JUD. CONDUCT Canon 3(F); *cf. id.* at 3(H) (remittal of disqualification of justices of the Ohio Supreme Court).[11]

Notwithstanding the fact that thirty-nine (39) states elect their judges, *Republican Party of Minnesota v. White*, 536 U.S. 765, 790 (2002) (O'CONNOR, J., concurring), *not a single state has adopted the ABA Model Code provision on campaign contributions.* Only one state, Alabama, in 1995, adopted by statute a similar provision, which places a recusal limit of $4,000 on supreme court and appellate judges and a $2,000 limit on trial judges. ALA. CODE §§ 12-24-1 & -2 (West 2006);[12] *see also Brackin v. Trimmier Law Firm*, 897 So. 2d 207, 230-34 (Ala. 2004) (Alabama Supreme Court Justice Brown's statement of non recusal, where campaign contributions by a PAC funded by an amici curiae in a case before him was not grounds for recusal, since friends of the court are not "parties" to the action); *see generally* Joseph J. Darby, *Guarantees and Limits of the Independence and Impartiality of the Judge*, 41 SAN DIEGO L. REV. 997, 1005 (2004) ("Most studies dealing with judicial independence and accountability fail to treat the judiciary of the several state courts.").

As discussed above, on January 25, 2006, the Chief Justice of the Ohio Supreme Court testified before the Ohio House Judiciary Committee on H.B. 266, wherein he stated that "[a] majority of citizens believe campaign donations influence the behavior of a judicial candidate if he or she should win. How can we expect citizens to believe otherwise when more than seven million dollars was raised by candidates in three of the Supreme Court races in 2004?" Chief Justice Thomas J. Moyer, Testimony on H.B. 266 before the Ohio House Judiciary Committee (Jan. 25, 2006).

Even this Court has acknowledged the reasonable apprehension people may have when they learn that opposing sides have financed the judges in their cases. "[R]elying on campaign donations may leave judges feeling indebted to certain parties. . . . Even if judges were able to refrain from favoring donors,

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[11] The commentary to this section is reprinted *infra* App. 88.

[12] These statutes are reprinted *infra* App. 75.

the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary." *White*, 536 U.S. at 790 (O'CONNOR, J., concurring) (citations omitted).

As has been recognized by the ABA, there needs to be a disqualification and recusal standard for campaign contributions, yet only Alabama has one. This Court has recognized that recusal is the due process counter-weight to judicial free speech issues, which include campaign contributions. *See White*, 536 U.S. at 794 (KENNEDY, J., concurring); *id.* at 802 (STEVENS, J., dissenting) ("'the problem of individual bias is usually cured through recusal'" (citation omitted)); *see generally* Tobin A. Sparling, *Keeping Up Appearances: The Constitutionality of the Model Code of Judicial Conduct's Prohibition of Extrajudicial Speech Creating the Appearance of Bias*, 19 GEO. J. LEGAL ETHICS 441, 466 (2006) (arguing that due process rights must prevail in the end over judicial free speech).

Here, to read the Ohio Supreme Court's Judgment Entry denying the Plaintiff's Affidavits of Disqualification, Ohio judges are now going to be told that campaign contributions, no matter how much or how often, are not grounds for recusal or disqualification. Surely, this is not a good thing.

In a nutshell, this Case is "certworthy," because it presents this Court with a timely opportunity, before the ABA considers the proposed revisions to the Model Code of Judicial Conduct in February of 2007, to make clear that the restrictions let loose by *White* must be counter-balanced with the litigant's procedural due process rights via a sound and comprehensive disqualification and recusal procedure. *See White*, 536 U.S. at 797-803 (STEVENS, J., dissenting) (describing how serious this issue is).

On the merits, the Trial Court *admitted* that there were grounds for disqualification, and neither it nor the Ohio Supreme Court explained what those grounds were or any counter-balancing factors that would weigh against disqualification: In fact, the Trial Court stated that it did not even care if the underlying case stayed on its docket! It is inconceivable under these circumstances, given all of the above, that this

Court would not decide the merits in favor of the Petitioner, when it has held under the comparable federal statute that a violation occurs even if the judge is unaware of the infraction. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988); *see* 28 U.S.C. §§ 144, 455;[13] *see generally* Fed. Jud. Ctr., RECUSAL: ANALYSIS OF CASE LAW UNDER 28 U.S.C. §§ 455 & 144 (2002) (overview of federal case law on topic). The merits are discussed in more detail in the Plaintiff's Motion for Clarification and/or Reconsideration, at 31-37 (reprinted *infra* App. 62-70).

IV. The Failure of the State of Ohio to Provide a Procedural Mechanism or Process for Disqualifying an Ohio Supreme Court Justice, When It Provides a Method for Seeking Disqualification of All Other Types of Judges, Violates the Petitioner's Fourteenth Amendment Procedural Due Process Right to Be Heard on his Substantive Due Process Right to a Fair and Impartial Chief Justice –

In Ohio, disqualification of lower court judges is vested in the Chief Justice of the Ohio Supreme Court. OHIO CONST. art. IV, § 5(C),[14] but there is no disqualification procedure for members of the Ohio Supreme Court, who are expected to self-disqualify, when required to do so. OHIO CODE. JUD. CONDUCT Canon 3(G); *see generally* 22 OHIO JUR. 3D *Courts & Judges* § 116 (West 2006) (discussing same). As such, a movant has nothing but persuasion to use against a Chief Justice, who would otherwise be subject to disqualification. However, the Ohio Supreme Court knows how to create a disqualification

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[13] These statutes are reprinted *infra* App. 72.

[14] This section provides as follows:

> The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

OHIO CONST. art. IV, § 5(C)

procedure for itself, when it has a self-interest to do so. *See* OHIO R. GOV. JUD. II, § 4.[15]

By statute, the State of Ohio provides a remedy in disqualification regarding county and municipal judges, OHIO REV. CODE ANN. § 2701.031 (West 2006),[16] common pleas judges, *id.* at § 2701.03,[17] probate judges, *id.* at § 2101.39,[18] and appellate judges, *id.* at § 2501.13,[19] yet it provides no such remedy for disqualifying Ohio Supreme Court justices. *Cf.* 28 U.S.C. §§ 144, 455 (bias or prejudice of judge; disqualification of justice, judge, or magistrate); *see generally* Fed. Jud. Ctr., RECUSAL: ANALYSIS OF CASE

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[15] This section provides as follows:

> Notwithstanding any of the provisions of Gov. Bar R. V and Gov. Jud. R. II and III, if the person who is the complainant or the respondent in the disciplinary, disability, retirement, removal, or suspension proceeding is a Justice or the Chief Justice of the Supreme Court of Ohio, all members of the Supreme Court shall be disqualified to hear or determine any matter in the proceeding, and the Supreme Court shall be composed of a panel consisting of thirteen members, the Chief Justice of the Courts of Appeals elected pursuant to section 2501.03 of the Revised Code and the presiding judge of each of the appellate districts of Ohio. If any presiding judge is disqualified, unable to serve on the panel, or required to preside in place of the Chief Justice of the Courts of Appeals under this section, the most senior Courts of Appeals judge, other than the presiding judge, in that district shall serve in place of that judge. The Chief Justice of the Courts of Appeals shall serve as Chief Justice of the Supreme Court for the purpose of the proceedings. If the Chief Justice of the Courts of Appeals is disqualified or otherwise unable to serve, the presiding judge most senior in length of service as a judge of the Courts of Appeals who is appointed to the panel under this section shall preside for purposes of the proceedings. If two or more presiding judges are equally senior, selection of the judge to preside shall be by majority vote of the panel.

OHIO R. GOV. JUD. II, § 4

[16] This statute is reprinted *infra* App. 84.

[17] This statute is reprinted *infra* App. 79.

[18] This statute is reprinted *infra* App. 78.

[19] This statute is reprinted *infra* App. 79.

LAW UNDER 28 U.S.C. §§ 455 & 144 (2002) (overview of federal case law on topic).

So while the Ohio Code of Judicial Conduct requires members of the supreme court to recuse themselves under the same standards set-out above, there is no procedural mechanism or process for an independent and impartial hearing on disqualification, when it comes to the Chief Justice of the Ohio Supreme Court (or his fellow associate justices). For the reasons discussed above, this is a per se procedural due process violation, because there is a complete inability to be heard on, let alone enforce, a fundamental right such as the right to a fair and impartial tribunal.

As such, the Plaintiff was left with politely asking the Chief Justice of the Ohio Supreme Court, if he would consider whether or not he should recuse himself due to the size and number of contributions received from the Defendant Baker & Hostetler LLP and its relations, Plaintiff's Motion for Clarification and/or Reconsideration, at 5 (reprinted *infra* at App. 23), which the Chief Justice essentially ignored. *See infra* App. 1-5.

In his Motion for Clarification and/or Reconsideration, the Petitioner specifically addressed this issue, and he specifically asked the Chief Justice of the Ohio Supreme Court to recuse himself, if he could not explain on the record how he could be impartial under the circumstances, Plaintiff's Motion for Clarification and/or Reconsideration, at 27-31 (reprinted *infra* at App. 58-62), which was totally ignored by the Chief Justice, *see infra* App. 8-9, when he had an obligation to explain on the record whether or not he could be fair and impartial herein.

Specifically, "[a] judge should timely disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." OHIO CODE JUD. CONDUCT Canon 3(E) (Commentary). The Chief Justice of the Ohio Supreme Court has repeatedly held that the failure of a judge to respond to an affidavit of disqualification creates a disqualifiable appearance of impropriety, *e.g.*, *In re Disqualification of Corrigan*, 94 Ohio St. 3d 1234, 1235, 763

N.E.2d 602, 603 (2001), and the appearance of impropriety is exactly the same to the Petitioner, when no explanation was given.

Just like with the allegations against the Trial Court, this pay-to-play mentality is exactly why the ABA amended Canon 3(E) to include mandatory disclosure and disqualification over certain threshold contribution limits. *See* ANNOTATED MODEL CODE, *supra*, at 206-07 (discussing campaign contributions and noting that judges were already encouraged before the amendment to disclose if a party had contributed to his or her campaigns – especially if the amounts were extraordinary). And even without that specific language in Ohio's Code, this conduct still gives rise to a situation where the Chief Justice of the Ohio Supreme Court's "impartiality might reasonably be questioned," OHIO CODE JUD. CONDUCT. Canon 3(E)(1), which even he specifically recognized in *In re Disqualification of Horvath*, 2004-Ohio-7356, 105 Ohio St. 3d 1247, 826 N.E.2d 305 (2004), where neither the size, timing, nor circumstances of delivery, of a $400 campaign contribution by *opposing counsel* was found *sufficient* to warrant disqualification. *Id.* at ¶12. Here, we are dealing with campaign contributions to both the Trial Court and to the Chief Justice of the Ohio Supreme Court by *parties* to the underlying case.

According to a leading commentator on judicial disqualification, who is the Plaintiff's Expert Witness herein:

> The practice of accepting gifts or favors from parties implicates fundamental policy concerns. Parties are usually not permitted to give such gifts or favors, and judges are usually not permitted to accept them. Indeed, even favors that were bestowed on a judge by a person before he or she became a party before that judge may raise concerns sufficient to warrant judicial disqualification in certain circumstances.

RICHARD E. FLAMM, *supra*, § 6.2.2 (footnotes omitted); *cf. id.* § 6.4.1 (discussing propriety of campaign contributions); *see also* JEFFREY M. SHAMAN, STEVEN LUBET & JAMES J. ALFINI, *supra*, § 11.12 (discussing disqualification implications of campaign support or opposition).

The Chief Justice of the Ohio Supreme Court has testified to the impact of money on the reputation of the Ohio judicial system, and recently, the Cleveland Plain Dealer Editorial Page called Ohio "a state that's a national symbol of courts for sale." Editorial Opinion, *Ohio Supreme Court*, CLEVELAND PLAIN DEALER, Apr. 6, 2006, at B-8.

Given the fact that the Plaintiff had nowhere to turn to file an affidavit of disqualification against the Chief Justice of the Ohio Supreme Court, the Plaintiff was, per se, deprived of his procedural due process rights in the Ohio Supreme Court. For the reasons discussed above, the Petitioner was also deprived of his substantive due process rights therein.

CONCLUSION

In conclusion, and for the foregoing reasons, this Supreme Court of the United States should GRANT the Petitioner, Mr. Jeffrey F. Jones, a writ of certiorari to review the Ohio Supreme Court's refusal to disqualify the Trial Court from presiding over his underlying and pending legal malpractice case against the Defendants.

Respectfully submitted,

RICHARD G. JOHNSON
Counsel of Record
RICHARD G. JOHNSON CO., L.P.A.
220 Crittenden Court Building
955 West St. Clair Avenue
Cleveland, Ohio 44113-1210
216/696-1000

Attorney for the Petitioner

[dated: 7/10/06]

IN THE SUPREME COURT OF OHIO

JEFFREY F. JONES,
Plaintiff,
vs.
BAKER & HOSTETLER, LLP, et al.,
Defendants.

Common Pleas Case No. CV-03-518194
From the Cuyahoga County Court of Common Pleas
Supreme Court Case No. 06-AP-15

Judgment Entry

Plaintiff Jeffrey Jones, his attorney Richard Johnson, and attorney Richard Flamm have filed affidavits with the Clerk of this Court under R.C. 2701.03 seeking the disqualification of Judge Janet Burnside from acting on any further proceedings in Case No. CV-03-518194 in the Court of Common Pleas for Cuyahoga County.

The affiants contend that Judge Burnside has received campaign contributions between 1992 and 2005 totaling at least $8,300 from the law firm of Baker & Hostetler, which was a defendant in the case until the plaintiff voluntarily dismissed his claims against that party in October 2005. Attorney Flamm – the author of a treatise on judicial disqualification – offers the opinion that a reasonable and objective observer would question the ability of the judge to serve impartially in the case, given her acceptance of large campaign contributions from the Baker firm and her failure to disclose those contributions to the parties.

The affiants also describe some of the judge's rulings in the case as "arbitrary and capricious," and they contend that 93% of her substantive rulings in the case have favored the defendants. This alleged favoritism in judicial

rulings, coupled with the large campaign contributions to the judge from the defendants, calls the judge's impartiality into doubt, according to the affiants. They also fault her for failing to explain her refusal to step aside when they raised these concerns in a motion asking her to recuse.

Affiant Johnson also suggests that my own ability to rule on the affidavits of disqualification in this case is suspect because the Baker firm has contributed to my judicial campaigns as well.

Judge Burnside has responded to the affidavits in writing. She denies holding any bias or prejudice for or against any of the parties or their attorneys. She explains that she was unaware of the amount of Baker & Hostetler's contributions to her judicial campaigns, and she contends that no law firm's contributions stand out in her mind. She makes decisions, the judge explains, based on her best judgment without regard to the amount or frequency of contributions from parties or lawyers. The judge notes as well that she is unopposed for reelection this year, so her campaign committee will not be soliciting any additional campaign funds in 2006.

The judge also denies that she has treated this case differently from any others on her docket, and she denies tailoring her rulings to favor one side or the other. "I ruled as I saw fit," she explains, "without any bias against or favoritism for any party." She adds that she does not care whether or not the case stays on her docket.

I find no basis for ordering the disqualification of Judge Burnside. Her very thorough response addresses every allegation in the affidavits, and both the tone and the content of that response show quite clearly that the

judge is neither biased nor prejudiced against the plaintiff. Even though Judge Burnside has evidently received campaign contributions from the Baker & Hostetler firm in past judicial campaigns, I cannot conclude that a reasonable and objective observer – one familiar with both the allegations in the affidavits and the judge's response to those allegations – would hold serious doubts about her ability to serve fairly and impartially in this case. She has explained why she did not disclose those contributions – because she relied on professional campaign fundraisers and has not kept a mental log of campaign contributions or contributors while performing her judicial duties – and I see nothing in the record before me to call that explanation into doubt.

As attorney Flamm notes in his affidavit, elected judges are generally not required to recuse themselves from cases in which a party is represented by an attorney who has contributed to or has raised money for the judge's election campaign. See *In re Disqualification of Jackson* (1998), 84 Ohio St.3d 1232, 1233 ("the mere fact that a party or lawyer in a pending case campaigned for or against a judge is not grounds for disqualification"); *Nathanson v. Korvick* (Fla. 1991), 577 So.2d 943, 944 ("judges are not required to disqualify themselves based solely upon the allegation that an attorney or litigant has made a campaign contribution to the political campaign of the judge or the judge's spouse"); *Rocha v. Ahmad* (Tex. App. 1983), 662 S.W.2d 77, 78 ("If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts").

That standard rule applies in this case. The affiants correctly assert that they are entitled to a fair hearing and an impartial decision-maker, and they rightly suggest that a judge's receipt of large campaign contributions might call into question the judge's impartiality in a particular case. In this case, however, Judge Burnside's explanation of her fundraising activities and her decision-making process do not convince me that the two are linked in the way that the affiants suggest. She appears to have done her best to separate her judicial duties from her campaign activities, and in a State in which judges are elected, that is the most we can ask of those who seek and secure judicial office. Given Judge Burnside's statement that she raised more than $1 million in a statewide campaign in 2002 alone, her receipt of "at least $8,300" from the Baker firm – as the affiants allege – does not call into serious doubt the judge's ability to preside fairly and impartially in this case.

Judge Burnside's assurances that she has made all decisions in the case using her best judgment without bias for or against any party, coupled with her statement that she does not care whether the case remains on her docket, prompt me as well to reject the affiants' assertion that disqualification is warranted based on "arbitrary and erroneous rulings" by the judge. It is not the role of the Chief Justice in cases such as this to question the correctness of a judge's rulings, and nothing in the judge's response suggests to me that she has approached her judicial duties in the case with anything other than the requisite open state of mind. Though some decisions of a trial judge can be challenged on appeal, a party's disagreement or dissatisfaction with a court's rulings of law, without more, does not demonstrate bias or prejudice. *In*

re Disqualification of Murphy (1988), 36 Ohio St.3d 605. Even though the affiants contend that I ought to question the judge's rulings because those rulings have allegedly favored a campaign contributor, I conclude that a reasonable and objective observer familiar with the judge's response would not believe that her rulings were the result of any disqualifying bias or prejudice.

As I have said, "[a] judge is presumed to follow the law and not to be biased, and the appearance of bias or prejudice must be compelling to overcome these presumptions." *In re Disqualification of George*, 100 Ohio St.3d 1241, 2003-Ohio-5489, ¶ 5. Those presumptions have not been overcome in this case.

For the reasons stated above, the affidavits of disqualification are denied. The case may proceed before Judge Burnside.

Dated this 17th day of March, 2006.

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

Copies to: Marcia J. Mengel, Clerk of the Supreme Court
Hon. Janet R. Burnside
Gerald E. Fuerst, Cuyahoga County Clerk of Courts
Richard G. Johnson, Counsel for Plaintiff
Mark R. Koberna and Stephen B. Doucette, Counsel for Defendant Bennett

IN THE SUPREME COURT OF OHIO

JEFFREY F. JONES, Plaintiff, vs. BAKER & HOSTETLER, LLP, et al., Defendants.	Common Pleas Case No. CV-03-518194 From the Cuyahoga County Court of Common Pleas Supreme Court Case No. 06-AP-15 **Judgment Entry on the 3/17/06 Motion for Reconsideration**

The affidavits of disqualification filed in this case on February 17, 2006 were denied by entry dated March 17, 2006. On March 17, 2006 after I signed the entry denying the affidavits, affiant Richard Johnson – plaintiff's counsel – filed an additional affidavit, which I will treat as a request for reconsideration of my decision issued that day.

I have reviewed the latest filing, and I conclude that it does not contain any information or substantive allegations that were not previously considered. I have again examined the allegations raised by affiant Johnson, and I conclude that Judge Burnside can preside fairly and impartially over further proceedings in the trial court.

Accordingly, the request for reconsideration is denied, and the case may proceed before Judge Burnside.

Dated this 21st day of March, 2006.

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

Copies to: Marcia J. Mengel, Clerk of the Supreme Court
Hon. Janet R. Burnside
Gerald E. Fuerst,
Cuyahoga County Clerk of Courts
Richard G. Johnson, Counsel for Plaintiff
Mark R. Koberna and Stephen B. Doucette,
Counsel for Defendant Bennett

IN THE SUPREME COURT OF OHIO

JEFFREY F. JONES,

Plaintiff,

vs.

BAKER & HOSTETLER, LLP, et al.,

Defendants.

Common Pleas Case No. CV-03-518194

From the Cuyahoga County Court of Common Pleas

Supreme Court Case No. 06-AP-15

Judgment Entry on the 4/7/06 Motion for Reconsideration

The affidavits of disqualification filed in this case on February 17, 2006 were denied by entry dated March 17, 2006.

On March 17, 2006, affiant Richard Johnson – plaintiff's counsel – filed a request seeking reconsideration of that decision. I denied that request on March 21, 2006.

On April 7, 2006, Johnson filed a second request for reconsideration.

I have reviewed the latest filing, and I conclude that it does not contain any information or substantive allegations that were not previously considered.

Accordingly, the request for reconsideration is denied, as is Johnson's request for a stay. The case may proceed before Judge Burnside.

Dated this 11th day of April, 2006.

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

Copies to: Marcia J. Mengel, Clerk of the Supreme Court
Hon. Janet R. Burnside
Gerald E. Fuerst,
Cuyahoga County Clerk of Courts
Richard G. Johnson, Counsel for Plaintiff
Mark R. Koberna and Stephen B. Doucette,
Counsel for Defendant Bennett

The Supreme Court of Ohio
OFFICE OF THE CLERK
65 SOUTH FRONT STREET, COLUMBUS, OH 43215-3431

CHIEF JUSTICE
THOMAS J. MOYER

CLERK OF THE COURT
MARCIA J. MENGEL

JUSTICES
ALICE ROBIE RESNICK
PAUL E. PFEIFER
EVELYN LUNDBERG STRATTON
MAUREEN O'CONNOR
TERRENCE O'DONNELL
JUDITH ANN LANZINGER

TELEPHONE 614.387.9530
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February 17, 2006

Mr. Gerald E. Fuerst
Clerk of Courts
1200 Ontario Street
Cleveland, Ohio 44113

Re: 06-AP-015; Jeffrey F. Jones
v. Baker & Hostetler LLP, et al.;
Judge Janet R. Burnside

Dear Mr. Fuerst:

Pursuant to Section 2701.03 of the Revised Code, notice is hereby given that the enclosed affidavit of disqualification was filed with this office on February 17, 2006.

The affidavit relates to the above matter pending in your court. You are respectfully requested to notify any parties to the case, or their counsel, who have not been served by the affiant, that the affidavit has been filed.

If you have any questions, please contact David Gormley, Director of Legal Resources, at 614/387-9560.

Sincerely,

/s/ Abby Minnix
Abby Minnix
Deputy Clerk

/kmr
Enclosures

cc: David M. Gormley
Richard G. Johnson
Honorable Janet R. Burnside w/o encls.

The Supreme Court of Ohio
OFFICE OF LEGAL RESOURCES
65 SOUTH FRONT STREET, COLUMBUS, OH 43215-3431

CHIEF JUSTICE
THOMAS J. MOYER

DIRECTOR
LEGAL RESOURCES
DAVID M. GORMLEY

JUSTICES
ALICE ROBIE RESNICK
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February 21, 2006

Honorable Janet R. Burnside
Cuyahoga Co. Common Pleas Court
1200 Ontario Street
Cleveland, OH 44113-1678

RE: *Jeffrey F. Jones v. Baker & Hostetler LLP, et al.*
Your Case No. CV03518194
Supreme Court File No. 06-AP-15

Dear Judge Burnside:

Enclosed is an affidavit that has been filed with the Supreme Court that seeks your disqualification from the case referenced above. The affidavit appears to have been timely filed. Therefore, pursuant to R.C. 2701.03(D)(1), no further judicial rulings should be made by you until the affidavit has been ruled on by Chief Justice Moyer, except as provided in R.C. 2701.03(D)(2), (3), and (4).

Chief Justice Moyer would appreciate your written response to the affidavit within fifteen days of the receipt of this letter. Please forward your response directly to me. Responses of ten or fewer pages may be sent via facsimile

to my attention at (614) 387-9569. Upon receipt of your response, Chief Justice Moyer will review the matter and render a written decision on the merits of the affidavit.

Affidavit of disqualification files are public records, and a copy of any materials in the files will be provided to any person who so requests. Please contact me at (614) 387-9560 if you have any questions.

Sincerely,

/s/ David M. Gormley
David M. Gormley
Director of Legal Resources

Enclosure

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JEFFREY F. JONES Plaintiff	Case No: CV-03-518194
BAKER & HOSTETLER LLP, ET AL Defendant	Judge: JANET R BURNSIDE **JOURNAL ENTRY**

PLAINTIFF'S MOTION FOR RECUSAL FILED 2/1/06 IS DENIED.

/s/ Janet R. Burnside
Judge Signature 02/09/2006

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JEFFREY F. JONES Plaintiff	Case No: CV-03-518194
BAKER & HOSTETLER LLP, ET AL Defendant	Judge: JANET R BURNSIDE **JOURNAL ENTRY**

Pl JEFFREY F JONES MOTION FOR LEAVE TO FILE INSTANTER A REPLY IN SUPPORT OF HIS MOTION FOR RECUSAL & REPLY . . . . . FILED RICHARD G. JOHNSON 0046628, FILED 02/09/2006, IS DENIED AS MOOT.

/s/ Janet R. Burnside
Judge Signature 02/13/2006

IN THE SUPREME COURT OF OHIO

JANUARY TERM 2006

IN DISQUALIFICATION

Before the Honorable Thomas J. Moyer, Chief Justice, In Chambers

Case No. 06-AP-015

IN RE DISQUALIFICATION
OF JUDGE JANET R. BURNSIDE

Plaintiff's Motion for Clarification and/or Reconsideration of his Affidavits of Disqualification, *or in the Alternative*, Motion to Continue the Stay Pending a Petition for Writ of Certiorari

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On Disqualification From
Jones v. Baker & Hostetler LLP, et al.
Case No. CV-03-518194 • Judge Janet R. Burnside
Court of Common Pleas • Cuyahoga County, Ohio

To: Marcia J. Mengel, Esquire, Clerk, Supreme Court of Ohio, Ohio Judicial Center, 65 South Front Street, 8th Floor, Columbus, Ohio 43215-3431, *telephone* 614/387-9530, *facsimile* 614/387-9539, *e-mail* clerk@sconet.state.oh.us.

Counsel:

- Richard G. Johnson, Esquire, Richard G. Johnson Co., L.P.A., 220 Crittenden Court Building, 955 West St. Clair Avenue, Cleveland, Ohio 44113 1210, *telephone* 216/696 1000, *facsimile* 216/696 0020, Attorney for the Plaintiff;

- Mark R. Koberna, Esquire, Stephen B. Doucette, Esquire, Ann M. Johnson, Esquire, Sonkin & Koberna Co., L.P.A., 400 Enterprise Place, 3401 Enterprise Parkway, Beachwood, Ohio 44122-7340, *telephone* 216/514-8300, *facsimile* 216/514-4467, attorneys for the Defendant and Counter-Claimant; and

- The Honorable Janet R. Burnside, Judge, Cuyahoga County Court of Common Pleas, Justice Center – Courts Tower – Room 16-B, 1200 Ontario Street, Cleveland, Ohio 44113-1664, *telephone* 216/443-8671, *facsimile* 216/348-4038, Judge *Pro Se*.

[dated: 4/7/06]

* * *

II. THE MOTION FOR CLARIFICATION AND/OR RECONSIDERATION OF THE PLAINTIFF'S AFFIDAVITS OF DISQUALIFICATION, *OR IN THE ALTERNATIVE*, MOTION TO CONTINUE THE STAY PENDING A PETITION FOR WRIT OF CERTIORARI

Pursuant to the inherent power of this Court, the plaintiff, Mr. Jeffrey F. Jones ("JFJ" or "Plaintiff"), respectfully moves this Court to clarify and/or reconsider his Orders and Judgment Entries denying the Plaintiff's Affidavits of Disqualification regarding Judge Janet R. Burnside, or in the alternative, the Plaintiff respectfully

moves this Court to continue the stay of the underlying Case against the defendant, Paul E. Bennett, Esquire, and possibly other defendants as discussed below, so that the Plaintiff may file a petition for a writ of certiorari with the United States Supreme Court seeking a review of these Orders and Judgment Entries, for the reasons that follow:

A. The Relevant Facts –

1. Procedural History –

a. Overview –

The Plaintiff previously filed and voluntarily dismissed without prejudice his complaint against the defendants, Baker & Hostetler LLP, f.k.a Baker & Hostetler ("B&H" or "Defendant-1"), and Paul E. Bennett, Esquire ("PEB" or "Defendant-2"), in the underlying Case of *Jones v. Baker & Hostetler LLP, et al.*, No. CV-03-518194 (C.P. Cuyahoga, filed Dec. 30, 2003, voluntarily dismissed Oct. 26, 2005) (BURNSIDE, J.) ("Legal Malpractice Case I"), and he refiled these and additional claims in the case of *Jones v. Baker & Hostetler LLP, et al.*, No. CV-05-11-6529 (C.P. Summit, filed Nov. 4, 2005, transferred Mar. 9, 2006) (COSGROVE, J.) ("Legal Malpractice Case II"), against the defendants, B&H, PEB, Dale A. Bradford, Esquire ("DAB" or "Defendant-3"), Gary L. Bryenton, Esquire ("GLB" or "Defendant-4"), John M. Gherlein, Esquire ("JMG" or "Defendant-5"), Catherine M. Kilbane, Esquire ("CMK" or "Defendant-6"), Hudak, Shunk & Farine Co., L..P.A., f.k.a. Hudak & Shunk Co., L.P.A. ("HS&F" or "Defendant-7"), and Laura F. Shunk, Esquire ("LFS" or "Defendant-8").

All of these Defendants, with the exception of PEB (who both answered and moved to dismiss), moved the Summit County Court of Common Pleas to transfer the

Legal Malpractice Case II back to Cuyahoga County on the basis that it was a "refiled" case, even though none of those movants were parties in the first lawsuit (except for B&H). On March 9, 2006, the Summit County Court of Common Pleas transferred the entire lawsuit (including PEB) back not just to Cuyahoga County but to the docket of Judge Janet R. Burnside, which was effectuated by the Summit County Clerk on March 16, 2006. Thereafter, the Plaintiff moved for reconsideration, which the Summit County Court of Common Pleas denied on March 29, 2006, a copy of which is attached hereto and incorporated herein by reference. Also attached hereto and incorporated herein is an update of the Cuyahoga County Case Docket, which shows that the Summit County Case was consolidated with the Cuyahoga County Case – without any such order having been made by the Cuyahoga County Court of Common Pleas, and without having been randomly assigned to a trial judge as required by law.[1] All other relevant court documents on this issue have been previously filed with this Court.

The Plaintiff previously filed an eviction case against PEB in the case of *Jones v. Bennett*, No. 04-CVG-808

[1] As such, while the Legal Malpractice Case II Defendants now appear on the Legal Malpractice Case I Docket as being part of this underlying Case, the Cuyahoga County Clerk of Courts is without authority to have followed the orders of the Summit County Court of Common Pleas, which really illegally ordered an inter-county case consolidation on the implicit grounds of forum *non conveniens*, and this entire issue will now have to be litigated in mandamus and prohibition before this Court on authority of *State ex rel. Smith v. Cuyahoga County Court of Common Pleas*, 2005-Ohio-4103, 106 Ohio St. 3d 151, 832 N.E.2d 1206 (2005). For now, however, the Legal Malpractice Case II Defendants are *de facto*, if not *de jure*, defendants in the underlying Legal Malpractice Case I at issue herein.

(Muni. Lakewood, filed Apr. 13, 2004) (CARROLL, J.), which was transferred to the Cuyahoga County Court of Common Pleas as *Jones v. Bennett*, No. 04-CV-531337 (C.P. Cuyahoga, filed May 26, 2004) (JONES, J.), after PEB filed the exact same counter-claim as was then pending in the Legal Malpractice Case I, which was later consolidated with the aforementioned case of *Jones v. Baker & Hostetler LLP*, and which was voluntarily dismissed without prejudice on September 1, 2005 ("Eviction Case I"). On October 26, 2005, the Plaintiff refiled this claim in the case of *Jones v. Bennett*, No. 05-CVG-2590 (Muni. Lakewood, filed Oct. 26, 2005) (CARROLL, J.) ("Eviction Case II"), against the defendant, PEB, who did not counter-claim this time. On December 8, 2005, the magistrate issued a report and recommendation granting the Plaintiff's writ of restitution, after having conducted a trial on November 23, 2005, and this Eviction Case II is now awaiting the municipal court's ruling on PEB's objections thereto, after having conducted a hearing on the same on February 3, 2006.

b. Recusal/Disqualification –

On February 1, 2006 in the underlying Case, and pursuant to OHIO CODE JUD. CONDUCT 3(E), the Plaintiff moved the Trial Court to recuse itself, because the Trial Court's "impartiality might reasonably be questioned" therein. *Id.* at 3(E)(1).

The basis was that (1) the Trial Court had failed to disclose the extraordinary political contributions made to it by the Defendants and their partners, that (2) the Trial Court had taken a personal interest in the underling [sic] Case, that (3) the Defendants and their partners were behaving as if they had purchased special favor with the Trial Court, where one of the Defendants had actually stated in

sworn testimony that the Trial Court would issue a declaratory judgment in his favor at the then upcoming Trial, and that (4) the Trial Court had made numerous rulings in the underlying Case that were arbitrary and capricious, any and all of which would lead any objective observer to conclude that the Trial Court's "impartiality might reasonably be questioned" therein. *Id.*

On February 6, 2006, the Defendant opposed that recusal motion, and on February 9, 2006, the Plaintiff filed a Motion for Leave to File *Instanter* a Reply in Support thereof, which the Trial Court denied as moot on February 14, 2006, after having apparently denied the recusal motion the same day as the Reply was filed on February 9th. Importantly, the Defendant did not contest any of the facts upon which the Plaintiff was moving for recusal, the Trial Court denied that recusal motion without opinion, and the Trial Court has now admitted that it did not even bother to read the Plaintiff's Reply.

On February 17, 2006, the Plaintiff filed with this Court Affidavits of Disqualification from himself, his undersigned counsel, and his judicial disqualification expert witness, Richard E. Flamm, Esquire.

On February 21, 2006, this Court wrote to the Trial Court and requested that it respond to these Affidavits; however, this Court did not copy the Plaintiff on this letter, and the Plaintiff did not learn of it, and receive a fax of the same from this Court, until March 1, 2006.

On February 28, 2006, the Plaintiff filed a Supplemental Affidavit from his counsel, which was technical in nature, and merely provided originals of signature pages to two (2) of the Affidavits, and which disclosed updated docket information in the underlying Case.

On March 13, 2006, the Trial Court filed its response with this Court, wherein it did not specifically deny any of the bases for disqualification or the facts underlying these bases.

The Trial Court did not mail that response to the Plaintiff until March 15, 2006, which the Plaintiff's counsel received on March 16, 2006. The Plaintiff, himself, called and received a fax of the same from this Court on March 15, 2006. On March 16, 2006, the Plaintiff's counsel faxed this Court a request to respond to the Trial Court's letter until Monday, March 20, 2006.

On March 17, 2006, this Court denied the Plaintiff's Affidavits of Disqualification.

On March 17, 2006, the Plaintiff faxed his Reply in Support of his Affidavits of Disqualification to this Court, which was filed on March 21, 2006.

On March 21, 2006, this Court treated the Plaintiff's Reply as a motion for reconsideration and denied the same.

2. Facts Presented to this Court –

a. Plaintiff's Counsel's Affidavit –

In his Affidavit of Disqualification, the Plaintiff's counsel stated, in part, as follows:

> 5. I verify the facts set-out in my Client's Motion for Recusal as well as the Reply in Support thereof as they relate to me, which are attached hereto and incorporated herein by reference; as such, I intend this Affidavit to merely amplify why I feel that the Trial Judge should be disqualified, because her impartiality might reasonably be

questioned, and this Affidavit needs to be read in conjunction with both aforesaid motion papers as well as with the predecessor Affidavits of Richard E. Flamm, Esquire and my Client.

6. As set-out in the recusal motion papers, the Chief Justice has received a very large amount of campaign contributions from Baker & Hostetler LLP, its Ohio PAC, and its partners, and I would merely suggest that the Chief Justice consider whether or not he can be impartial herein. After a lot of consideration on the topic, neither I nor my Client will ask the Chief Justice to recuse himself from hearing this disqualification request, and we trust the Chief Justice to voluntarily recuse himself, if he feels that past contributions would impact his decision; likewise, if he does not, then we trust him to rule on this request impartially and without regard to past campaign contributions, and we will live with his sound judgment either way.

7. In regards to the arbitrary and capricious rulings set-out as examples, I am attaching the motion papers for the first two (2) subjects identified, so that the Chief Justice can see these not as sour grapes but of such extreme examples of bending over backwards to help one side that they are embarrassing.

8. As emphasized by Expert Flamm, the Trial Judge, when presented with more than enough evidence to support a recusal motion chose to do nothing to reassure my Client that she could be fair and impartial or otherwise explain any of the issues brought to her attention, and I interpret this the same way as does my Client: I personally believe that her failure to explain herself on recusal speaks more loudly to her partiality than

anything else – especially her failure to account fully for whatever she might have received in the past from B&H, its PAC, and its partners, as well as her failure to announce publicly that she will not solicit campaign funds from B&H, its PAC, and its partners, during this election cycle. I know that she is actively campaigning and raising funds, and I even received an invitation for a fundraiser the Trial Judge held on February 2, 2006, which I chose not to attend.

9. What is not emphasized anywhere, because it is speculation, is that there is more of a relationship with B&H than the Trial Judge has let on. B&H, its PAC, and its partners, as set-out in the motion papers, generally support Republican candidates. As such, it is inexplicable, apart from a very personal relationship with the law firm and its partners, why a liberal Democrat has been supported for so long and to such a great extent. Since the Trial Judge will not account, as requested by the Plaintiff in his recusal motion, he and I are just left to wonder what the relationship is – however, there is no rational explanation apart from a special relationship that would explain this odd couple, so-to-speak.

10. Actions speak louder than words, and the fact that all of the Summit County Defendants, even those who are domiciled in Summit County, want to be transferred not just to Cuyahoga County – but to Judge Janet R. Burnside – speaks volumes about what the Defendants think about her partiality: They truly believe that she will be partial to them, otherwise, they would not have filed such completely unsupported motions trying to change venue.

11. The Chief Justice gets called upon often to speak about the elected judiciary, money in politics, etc., and this disqualification request affords the Chief Justice the opportunity to try to balance the practical realities of fundraising with judicial ethics. I think the Chief Justice should announce a bright-line rule that judges should be required to disclose when parties or their counsel have given the judge the maximum contribution amount in their last or current election cycle, so that no party is ever left again where my Client and I find ourselves, which is with no faith that we have a fair and impartial Trial Judge. Politics would hardly suffer, if judges were forced to recuse themselves on request in the instance of having received such maximum contributions from *parties*; instead, litigants would be assured that those most financially allied with a judge were not also being judged by the same. Whether or not such recusal should always be required in the instance of contributions by *lawyers* is not something that needs to be decided now. But when the Trial Judge allowed a maximum contributor party to appear before her without disclosure to me and my Client, she created this problem – which the Defendants are jointly responsible for, because they surely knew how much money they had given her and could have just as easily put the issue on the table.

12. In conclusion, I truly believe that there is cause and effect here, which is evidenced by Paul E. Bennett, Esquire's testimony as set-out in the recusal motion papers. I do not believe that the Trial Judge has been fair and impartial, and I believe that she intends to continue in that same vein, unless this Case is reassigned to another judge, who should be one not beholden to B&H.

> Mr. Bennett's testimony is proof positive of this, and he did not deny or explain his testimony in his recusal opposition – and neither did the Trial Judge in denying the recusal motion.

Plaintiff's Counsel's Affidavit of Disqualification, at ¶¶5-12.

b. Facts Incorporated into the Plaintiff's Counsel Affidavit from the Underlying Recusal Motion –

i. Procedural History –

. . .

In this Case, this Court's judicial staff attorney told the undersigned early on that she was out-of-the loop on when a pending motion might be ruled upon, because this Court had taken a personal interest in this Case, that this Court was making all of the rulings without input from her, and that this Court had even taken the Case file to its home, so she could not further check the status of when a ruling might be forthcoming.

In this Case, this Court has made the following arbitrary and capricious rulings:

1. It refused to strike Mr. Bennett's admittedly fraudulent First Amended Counter-Claim, even after Mr. Bennett admitted that the [sic] made up the exhibits to the Option Agreement upon which he is suing. Order & Judgment Entry, dated June 17, 2005;

2. It refused to allow the Plaintiff to add a securities fraud expert witness or to file a first amended complaint, after Mr. Bennett testified to facts constituting securities fraud, in

part because this Court was worried about the "untoward impact an allegation of fraud in a purchase of securities would have on litigation of non-fraud claims. . . . " Order & Judgment Entry, dated June 29, 2005, which is attached hereto and incorporated herein by reference;

3. It refused to allow the Plaintiff to depose B&H's former national managing partner on issues regarding fraud, when the Plaintiff had already propounded an expert witness report on this subject, which had the effect of purposely limiting the Plaintiff from even creating his record of fraud for appeal. Order & Judgment Entry, dated Aug. 23, 2005, which is attached hereto and incorporated herein by reference;

4. It refused to allow the Plaintiff to file an unopposed motion for leave to file a motion for summary judgment on Mr. Bennett's fraudulent First Amended Counter-Claim, and, instead, it actually granted Mr. Bennett leave to oppose the same, when he had forgotten to do so, so that this Court could then grant his request to deny the Plaintiff's Motion. Order & Judgment Entries, dated Sept. 20 & 28, and Nov. 21, 2005, and Jan. 9, 2006; and

5. It refused to allow the Plaintiff to file a counter-claim to Mr. Bennett's First Amended Counter-Claim, even though this Court was made aware that Mr. Bennett was claiming that some or all of the Plaintiff's refiled legal malpractice claims in Summit County were compulsory counter-claims herein. Order & Judgment Entry, dated Jan. 9, 2006.

. . .

In the first Eviction Case, this Court made the following arbitrary and capricious rulings: It refused to set the eviction matter for trial or to even require Mr. Bennett to post the mandatory bond, since he had demanded a jury trial. Order & Judgment Entry, dated Aug. 20, 2004. This Court also refused to even hear the Plaintiff's then unopposed motion to dismiss Mr. Bennett's counter-claim therein. Order & Judgment Entry, dated August 10, 2004.

. . .

Under oath at the eviction trial [in Eviction Case II], and on cross-examination, the [sic] Mr. Bennett testified as follows regarding the gift at issue:

> Q. So you dispute that this is a gift?
>
> A. I do.
>
> Q. And you're asking the Court of Common Pleas to interpret and to clear this document to be a contract that's enforceable; correct?
>
> A. Yes, I do [sic.].
>
> Q. And the Court of Common Pleas has not issued a declaratory judgment interpreting this gift to be an enforceable contract; correct?
>
> A. No. But they [sic.] will in February.

Eviction Case II Trial Transcript, at 54-55.

ii. Political Donations & Gifts by the Defendants –

In this Case, [the Trial] Court has accepted huge political contributions from the Defendants without disclosing the same to the Plaintiff. For instance, in [the Trial] Court's 2000 campaign for its current term, it received at least $1,000 from the Baker & Hostetler LLP Ohio PAC, according to its own campaign financial reports, excerpts of which are attached hereto and incorporated herein by reference. This made B&H [the Trial] Court's fourth largest contributor. Since the Cuyahoga County Board of Elections does not keep records for [the Trial] Court's prior county campaigns, the Plaintiff has no idea what previous contributions may have been made by B&H to [the Trial] Court. Likewise, [the Trial] Court is just entering into its fundraising for its next reelection campaign, so the Plaintiff has no idea what further contributions either have been – or will be – received by [the Trial] Court from B&H.

In regards to [the Trial] Court's 2002 campaign for Ohio Supreme Court, B&H's Ohio PAC gave this Court $5,000 and at least three (3) B&H partners gave this Court an additional $300, and this information is attached hereto and incorporated herein by reference. In that campaign, [the Trial] Court raised 69.09% of its contributions from lawyers and lobbyists, and this information is also attached hereto and incorporated herein by reference. Statewide, B&H and its partners contributed almost $77,000 to Ohio political candidates just in 2002, and this information is attached hereto and incorporated herein by reference.

According to the Federal Election Commission, the following B&H partners, who are relevant herein, made the following contributions to B&H's Political Action Committee: (1) Mr. Bennett

contributed $900; (2) Mr. Bryenton contributed $8,900; (3) Mr. Gherlein contributed $2,200; (4) Ms. Kilbane contributed $1,400. In addition, B&H's in-house counsel have made the following similar contributions: (1) Ms. Newborn contributed $2,700; and (2) Mr. Vargo contributed $3,400. For the last four bienniums, B&H has dispersed a total of $462,815 to political candidates, nationally, through its federal PAC, which is in addition to the money donated by its local PACs and its partners. This information is all attached hereto and incorporated herein by reference.

iii. B&H's Stated Motivations –

During this same time period, B&H partner Jose C. Feliciano, Esquire, then-Cleveland Bar Association President, and a limited partner with the Plaintiff in Sarasota Restaurants, L.P., stated that he "believe[d] [that] lawyers give money to gain friends on the court." Jose C. Feliciano, *Merit Selection Would Increase Vote Confidence*, CLEVELAND PLAIN DEALER, Mar. 29, 2001, at B-9, which is attached hereto and incorporated herein by reference.

In accordance with Mr. Feliciano's stated views, B&H was the sixth largest contributor to Chief Justice Moyer in his 2004 election, after giving some $15,550 to him, and B&H gave a whopping total of $28,600 to all 2004 Ohio Supreme Court candidates. *See* Catherine Turner & Brandi Whetstone, *Election 2004: Campaign Contributions to Candidates for Chief Justice and Justice of the Ohio Supreme Court* (Ohio Citizen Action Education Fund), which is attached hereto and incorporated herein by reference. Statewide, B&H and its partners contributed

almost $53,820 to Ohio political candidates just in 2004, and this information is attached hereto and incorporated herein by reference.

As bragged to by B&H, it is one of the top twenty-four (24) "'go to' Power Elite U.S. law firms" in the country, and it is the largest locally-based law firm in Cleveland, since Jones Day claims not to [sic] based anywhere. CRAIN'S CLEVELAND BUSINESS, Dec. 26, 2005, at 38-39, which is attached hereto and incorporated herein by reference. Apparently, money, power, and politics are related, when it comes to B&H.

iv. The Chief Justice Weighs In –

Last week [1/25/06], Chief Justice Moyer testified before the Ohio House Judiciary Committee on H.B. 266, wherein he stated that "[a] majority of citizens believe campaign donations influence the behavior of a judicial candidate if he or she should win. How can we expect citizens to believe otherwise when more than seven million dollars was raised by candidates in three of the Supreme Court races in 2004?" Chief Justice Thomas J. Moyer, Testimony on H.B. 266 before the House Judiciary Committee (Jan. 25, 2006), which is attached hereto and incorporated herein by reference.

Plaintiff's Recusal Motion, Brief in Support, at 1-6 (subdivision numbering changed to coincide with the organization of this Motion).

c. *Facts Incorporated into the Plaintiff's Counsel Affidavit from the Underlying Recusal Reply* –

. . . [PEB] does not deny the previously undisclosed but longstanding relationship between

> [the Trial] Court and his former law firm of [B&H], of which he was a partner until 2002. As shown by the spreadsheet delineating all of the [B&H] Ohio PAC contributions from 1992 through 2005, which data was obtained from the Ohio Secretary of State, and which is attached hereto and incorporated herein by reference, [the Trial] Court was the third-largest recipient of contributions from B&H over the last fifteen (15) years; and when B&H's partners are included, this Court has received at least $8,300 from B&H and its partners over the years. In fact, B&H has made financial contributions to this Court *longer* than it has to any other judge listed on its disclosure reports. As previously briefed, in [the Trial] Court's last two (2) elections, B&H was among [the Trial] Court's very largest contributors. As such, there can be no dispute that [the Trial] Court has a long-standing and very important relationship with B&H, which can be expected to continue into this Court's newest campaign cycle.[2]
>
> . . . [T]he Plaintiff has already briefed why B&H gives to judicial candidates by quoting its partner's, Jose C. Feliciano, Esquire, own comments regarding the same. Ditto as to Chief Justice Moyer's very own observations about what reasonably objective onlookers believe, when they see the amount of money flowing to judicial candidates. [PEB] does not dispute either of these positions, and he does not dispute that a reasonably objective onlooker

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[2] In light of all of this, the Plaintiff respectfully requests that this Court fully account on the Record for each and every financial contribution it has received from B&H and its partners, and each and every social occasion or relationship that it has or has had with any B&H partners over the years.

would question [the Trial] Court's partiality in this Case.

Plaintiff's Recusal Reply, at 1-2.

d. Plaintiff's Affidavit –

1. I am the Plaintiff in this Case, and I have personal knowledge of the facts relevant herein.

2. I have reviewed the Motion for Recusal as well as the Reply in Support that was filed on my behalf herein.

3. I prepared the spreadsheets attached hereto, which are accurate to the best of my abilities, and which data was obtained from the Ohio Secretary of State as well as the Docket in this Case.

4. The reason that I authorized the filing of the Recusal Motion was that I felt that, based upon the totality of factors stated therein, the Trial Judge was not being fair and impartial to me, and that a new judge ought to be assigned to try this Case.

5. Given the Trial Judge's refusal to explain her reasons for not recusing herself, I believe that is a message to me that she does not care whether or not I have faith in her fairness and impartiality, and I believe that it is also a message to me that she has no intention of being fair and impartial in the Trial herein.

6. While statistics alone, I understand, do not prove anything in-and-of-themselves, given the fact that my legal ethics & professional responsibility expert witness is Michael E. Murman, Esquire, and my securities expert witness is Roger W. Van Duesen, Esquire, my legal malpractice claims are well-grounded, and in that light, it is

impossible to believe that a fair and impartial judge would deny thirty-three out of thirty-three (33/33) substantive motions filed herein on my behalf, while granting or granting in part eleven out of fourteen (11/14) of the Defendants' like motions. These Reports are attached hereto and incorporated herein by reference. In my opinion, and in the context of all of the other factors mentioned in my Recusal Motion and Reply in Support thereof, I believe that the Trial Judge intended to – and in fact did – send a clear message to me that I could not get a fair and impartial trial in her courtroom, which is why I voluntarily dismissed and refiled in Summit County.

7. I did not start to investigate the campaign contribution issue until after I received the transcript regarding [PEB's] testimony in December of 2005, and I did not complete that research until mid-to-late January 2006.

8. I believe that, given the good-faith basis for recusal, the Trial Judge's refusal to explain why she should remain on the Case, her refusal to disclose her other past contributions and social favors from [B&H] and its partners, and her refusal to say what funds she is currently raising from them (or renounce the acceptance of any such future campaign contributions from them), the Trial Judge has not only created the appearance of partiality, but worse, refused to correct that appearance, when requested to do so. How can I trust a judge, who is currently raising funds for her next campaign, who will not renounce the raising or receipt of funds from an opposing party or opposing real party in interest?

> 9. In short, I would respectfully request that the Chief Justice disqualify the Trial Judge herein and order this Case reassigned to another judge, who has not benefited to such a degree from [B&H's] campaign contributions.
>
> 10. To the best of my knowledge, information, and belief, the foregoing is true.

Plaintiff's Affidavit of Disqualification, at ¶¶1-10.

e. Plaintiff's Expert Witness Affidavit –

The Plaintiff's Expert Witness Affidavit of Richard E. Flamm, Esquire, is incorporated herein by reference, because it is too long to summarize. However, Expert Flamm's conclusion was as follows:

> In this case, it is my opinion that the magnitude of the campaign contributions Judge Burnside received from B&H, standing alone, would be sufficient to persuade a reasonable person that, in the absence of full disclosure to and remittal by the parties, she should not have undertaken to preside over this case. But even if the fact of her having received those contributions, or any of the other individual factors plaintiff has identified, would not be deemed by a reasonable person to be sufficient, standing alone, to call into question Judge Burnside's ability to be impartial, this seems to me to be one of those rare cases in which the cumulative effect of all of the many different factors plaintiff has alleged, when taken together, would warrant the conclusion that is in the interests of justice that this case be reassigned to another judge.

Plaintiff's Expert Witness Affidavit, at ¶61.

f. Admissions by the Trial Court in its Response –

The Trial Court did not specifically deny that (1) it had failed to disclose the extraordinary political contributions made to it by the Defendants and their partners, that (2) it had taken a personal interest in the underling [sic] Case, that (3) the Defendants and their partners were behaving as if they had purchased special favor with the Trial Court, where one of the Defendants had actually stated in sworn testimony that the Trial Court would issue a declaratory judgment in his favor at the then upcoming Trial, and that (4) it had made numerous rulings in the underlying Case that were arbitrary and capricious, any and all of which would lead any objective observer to conclude that the Trial Court's "impartiality might reasonably be questioned" therein. *Id.*

Instead, in its response herein, the Trial Court admitted the following:

1. In paragraph fourteen (¶14) of its letter that "members of the public may assume or suspect a judge's decisions in individual cases are driven by campaign contributions";

2. In paragraph sixteen (¶16) of its letter that it "appreciate[s] that members of the public may assume or suspect a judge's decisions in individual cases are driven by campaign contributions"; and

3. In paragraph nineteen (¶19) of its letter that it "do[es] not care whether this [C]ase stays on my docket or it is removed. There are advantages and disadvantages to either action."

g. Omissions by the Trial Court as Set Out in the Plaintiff's Reply –

1. The Trial Court states that it is not beholden to anyone, which is irrelevant: The question is whether the bases for disqualification argued by the Plaintiff would lead any objective observer to conclude that the Trial Court's "impartiality might reasonably be questioned" therein. *Id.*;

2. The Trial Court states that [it] has recused [itself] before, which begs the question why [it] did not do so here, when [it] admits that there were advantages to her doing so. If there was some compelling reasons for [it] not to have recused [itself], the Trial Court has not said, and both the Chief Justice and the Plaintiff are left to wonder why [it] did not just voluntarily recuse [itself], when there were admitted advantages to [it] doing so;

3. The Trial Court states that [it] is not beholden to [B&H], which, again, is irrelevant: The question is whether the bases for disqualification argued by the Plaintiff would lead any objective observer to conclude that the Trial Court's "impartiality might reasonably be questioned" therein. *Id.* As the Plaintiff said below in his Reply, which the Trial Court apparently chose not read, the Plaintiff does not have to prove that there was any quid pro quos, bribes, etc., in order to state a basis for disqualification, and the Plaintiff has not alleged any illegal conduct whatsoever;

. . .

8. The Trial Court states that [it] still does not know if B&H contributed to [its] 2002 campaign, when the evidence of the same was presented to

[it] in the Plaintiff's recusal motion, which implies that [it] did not read the appendix material thereto. A judge is required to keep [itself] informed of any bases for disqualification, OHIO CODE JUD. CONDUCT Canon 3(E)(2), yet the Trial Court apparently has still not educated [itself] on whether or not a party appearing before [it] was a major contributor to her campaign, which seems inconsistent with her obligations – at least by the time the recusal motion was presented. What is inherently inconsistent is the Trial Court's admission that the public integrity of [its] Court can be influenced by campaign contributions, but [it] apparently does nothing to ensure that [it] recuses [itself] in cases where campaign contributions might cause the public to question [its'] integrity;

9. The Trial Court admits that [it] would have sent thank you notes to B&H, but [it] does not specifically recall doing so now;

10. The Trial Court admits that [it] is now soliciting campaign contributions from B&H, and [it] does not affirmatively state that she has put in place a policy to exclude, identify, limit, etc., campaign contributions from parties, including B&H, appearing before her. The Trial Court says that [it] does not know whether or not B&H has made any donations this year, yet [it] does not attach an affidavit from her campaign treasurer attesting to the same, and [it] does not say that [it] even posed the question to [its' treasurer. How can the Plaintiff ever be assured of having a fair and impartial judge, when the Trial Court will not even issue a promise not to raise funds in the future from B&H, while it is appearing before her as a party, *which is quite different that appearing as counsel for a party*?

11. The Trial Court states that [it] will not be engaging in future fundraising solicitations, but [it] does not state that [it] will reject any future contributions, or give back any unknown current contributions, that will or have been made by B&H (see comments in preceding paragraph);

12. The Trial Court states that [it] is close friends with at least two (2) B&H partners, with whom [it] socializes, plays golf, officiated at their marriage, etc., but that [it] does not know, if they are involved in B&H's Ohio PAC; however, [it] implies that [it] does know who is involved in making those decisions. Importantly, the Trial Court does not state that [it] has not discussed the underlying Case with them. Importantly, too, the Trial Court does not describe the other close friendships that [it] has with other B&H partners, when it is implied that there are others, since [it] chose to only describe [it] "closest" ones. How can the Plaintiff ever be assured of having a fair and impartial judge, when the Trial Court admits to socializing with B&H partners during the timeframe of the underlying Case?

13. The Trial Court states that in 2003, when the underlying Case was filed, [it] did not recall whether or not B&H was a major contributor in her 1992, 1994, and 2000 elections, which is irrelevant. What is important is that the Trial Court has not disclosed [its] 1992 & 1994 campaign contributions from B&H partners, and her filings before 2000 are no longer retained by the Cuyahoga County Board of Elections. As such, the Plaintiff has no idea how much B&H attorneys contributed to the Trial Court outside of the firm and its PAC. The Plaintiff asked the Trial Court to provide this information in his Reply in Support of his recusal motion, yet [it] has not done so;

14. The Trial Court admits that "members of the public may assume or suspect a judge's decisions in individual cases are driven by campaign contributions," however, [it] denies that these played a part in her decisions below. That being said, [it] does not explain [its] arbitrary and capricious rulings identified as examples in the Plaintiff's Recusal Motion, like not letting the Plaintiff amend his pleadings to bring his securities fraud claims, like not letting the Plaintiff depose B&H regarding fraud, etc. It looks to the Plaintiff just like it looks to the general public, and it is irrelevant what the Trial Court's true motivations were: The question is whether the bases for disqualification argued by the Plaintiff would lead any objective observer to conclude that the Trial Court's "impartiality might reasonably be questioned" therein. OHIO CODE JUD. CONDUCT Canon 3(E)(1);

15. The Trial Court states that it is hard-working, normally takes its case files home, and rules on ninety-nine percent (99%) of the motions pending before [it]. What the Trial Court does not deny is that [its] law clerk told the undersigned that [it] had taken a personal interest in the underlying Case, or that [it] was treating her law clerk differently in the underlying Case versus other complex civil matters pending before it. There is nothing inherently wrong with a judge taking a case file home, but there is something suspicious, when a judge treats [its] law clerk differently in a single pending case, which was the impression given to the undersigned, when he inquired as to when a ruling on a certain motion might be expected. Moreover, what the Trial Court is now saying is cover, because if the Chief Justice were to believe it, then the Trial Court is

admitting that in at least one percent (1%) of the cases, someone else, i.e., [its] bailiff or law clerk, supposedly, is actually ruling on motions pending before [it], which would be grounds for disbarment and removal. As such, the Trial Court is not being forthright with how [it] uses [its] civil law clerk, which is a matter of necessity for a busy judge, who handles a huge civil and criminal docket. For the Trial Court to say that [its] civil law clerk is uninvolved in almost all of [its] civil rulings is not believable; for her to say that [its] law clerk is less involved as the complexity increases, when one would expect the law clerk to be more involved doing legal research for the judge, etc., is not believable, either;

16. Again, the Trial Court states that [it] "appreciate[s] that members of the public may assume or suspect a judge's decisions in individual cases are driven by campaign contributions," but then [it] counters that with the statement that [it] "enjoy[s] enormous judicial independence," which [it] supports by [its] election margins in [its] past campaigns, which ignores how [it] achieved those margins. To say that [the Trial Court] is independent, because [it] had high vote margins in Cuyahoga County, is a non sequitur. Winning says nothing about impartiality. And if money does not matter, then why is the Trial Court raising money this year, when [it] has no opponent? If she raised money before [it] found out [it] had no opponent, has [it] returned all of the donations as unnecessary? The fact is that even unopposed incumbent candidates need to raise money in order to mount an effective campaign, so that they do not receive a low voter margin, which, itself, would encourage someone

to run against them the next time; ditto in regards to having a war chest of funds;

17. As far as not providing an opinion in regards to denying the Plaintiff's recusal motion, the Trial Court states that [it] did not do so, because [it] expected this instant proceeding, which is exactly what a judge should not do. When a recusal motion is made, this is an opportunity to avoid a trip to the Chief Justice's chambers in disqualification, and a judge has a duty to affirmatively state why [it] can remain fair and impartial under the circumstances alleged – especially when the Trial Court admits that there were grounds for the recusal motion. Instead, while claiming that the Trial Court can remain fair and impartial if [it] is not disqualified, in this situation, [it] chose to force an adversary proceeding before the Chief Justice, where only there [it] would explain herself, and even then, hardly so. This does not promote the public's, let alone the Plaintiff's, faith in the fairness and impartiality of the judicial system. As the Plaintiff has already presented, a judge, who is not interested in trying to convince an aggrieved litigant that [it] can be fair and impartial, is at the very least indifferent to that litigant's impression of the court system, and such an attitude should be condemned by the Chief Justice on judicial economy reasons, if for no others. In recusal, a movant is saying to the court that it trusts the court enough to be fair in listening to the argument. When the Trial Court refused to give the Plaintiff the time of day, that constituted an additional indicia that the Trial Court is biased and prejudiced against him. *See generally* Cynthia Gray, *Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility*, 28

U. ARK. LITTLE ROCK L. REV. 63 (2005) (discussing the systemic bias against filing motions for recusal, among many other issues relating to this topic) [hereinafter Gray, *Avoiding the Appearance of Impropriety*];[3]

. . .

19. The Trial Court stated that [it] "do[es] not care whether this [C]ase stays on my docket or it is removed. There are advantages and disadvantages to either action." The Trial Court does not state what those advantages would be, or why, if this is so, [it] refused to recuse [itself]. In fact, nowhere does the Trial Court explain, after admitting that the perception created here is one that would favor recusal, and after admitting that [it] does not care if the underlying Case stays on her docket, why [it] did not just recuse herself in the first place. This is as close to an admission that the Trial Court made a mistake in denying the Plaintiff's recusal motion, and the Plaintiff is not adverse to the Chief Justice remanding for limited reconsideration on that single issue. The Plaintiff has no interest in obtaining a public order of disqualification, if the same can be achieved at the Trial Court level;

20. As far as the Trial Court's statement, that [it] never read the Plaintiff's Reply, which was filed and walked-up to her chambers apparently the same day that [it] denied without opinion the Plaintiff's recusal motion, as discussed above, a judge is supposed to be concerned about both the public's general perception of [its] fairness and

[3] Ms. Gray is the long-time director of the American Judicature Society's Center for Judicial Ethics.

impartiality as well as a litigant's appearing before [it]. As discussed by Gray, *Avoiding the Appearance of Impropriety, supra*, recusal motions place litigants in the terrible position of having to challenge the trial judge versus escalating the litigant's dispute with the trial judge to the state supreme court. How could the Trial Court here, whether it got the Plaintiff's Reply moments before or moments after, be so indifferent to what that Reply had to say, when [its] fairness and impartiality were reasonably be [sic] questioned by [its] own admission? The Reply was all of five (5) pages long! If, as the Trial Court now admits, there were advantages to recusal, would not a fair and impartial judge have wanted to know if this additional argument or information tipped the scales toward recusal? This failure showcases the fact that the Trial Court is not as unbiased and unprejudiced as [it] lets on to be; [and]

. . .

22. As far as no final pre-trial being set, all the Chief Justice needs to do is look at the fact that the underlying Case has been set and reset for Trial on numerous occasions with and without motions for summary judgment pending. The summary judgments were denied as moot last year, yet the case has been set for Trial twice since then without a final pre-trial. Since final pre-trials are generally an opportunity for settlement, the repeated failure of the Trial Court to set the underlying Case for final pre-trial is indicative to the Plaintiff that the Trial Court had a bias and prejudice in favor of the Defendants in the context of all of the other facts previously discussed. For the Trial Court to state that [it] does not follow the mandatory local rules of procedure in regards to setting mandatory final pre-trials is

> a subject that is outside of the parameters of this disqualification proceeding.

Plaintiff's Recusal Reply, at 3-11.

B. The Summary Conclusion –

This Court should clarify its Order and Judgment Entry denying the Plaintiff's Affidavits of Disqualification, because this Court's Opinion does not fairly set-forth the relevant facts presented by the Plaintiff, and because this Court did not affirmatively address whether or not it was subject to disqualification and should have recused itself from hearing these Affidavits.

This Court should reconsider its Order and Judgment Entry denying the Plaintiff's Affidavits of Disqualification, because this Court's Opinion misapplied the facts presented, incorrectly applied the objective legal standard of disqualification, and ignored the subjective legal standard of disqualification. In addition, this Court, when squarely faced with the larger constitutional question of how to balance judicial campaigning and free speech against a litigant's due process rights chose to ignore the question altogether.

If this Court chooses to deny the Plaintiff's Motion for Reconsideration, in the alternative, this Court should continue the stay of the underlying Case, so that the Plaintiff may file a petition for a writ of certiorari with the United States Supreme Court seeking a review of these Orders and Judgment Entries.

C. The Argument –

1. Introduction to Due Process –

As a preliminary matter, the Plaintiff must note that the proceedings herein and below are subject to the parameters of federal procedural due process. Specifically, "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

> The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.
>
> . . .
>
> [T]o determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.
>
> . . .
>
> Certain attributes of "property" interests protected by procedural due process [have] emerge[d]. . . . To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. [S/]He must have more than a unilateral expectation of it. [S/]He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance

> that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 569-77 (1972) (footnotes and citations omitted); *see also Leis v. Flynt*, 439 U.S. 438, 441 (1979) ("A claim of entitlement under state law, to be enforceable, must be derived from statute or legal rule or through a mutually explicit understanding." (citation omitted)).

In this light, it should come as no surprise that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (citing *Martinez v. California*, 444 U.S. 277, 281-82 (1980); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

> This conclusion is hardly a novel one. The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. . . . [F]or example – where a plaintiff's claim had been dismissed for failure to comply with a trial court's order – the Court read the "property" component of the Fifth Amendment's Due Process Clause to impose

> "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." Similarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]."

Id. at 429-30 (citations and footnote omitted); *cf. id.* at 430 n.5 (discussing by analogy the Court's decisions on the right to access the courts in instances where fundamental rights are involved).

Finally, "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Id.* at 432 (alterations in original; citations omitted). The test in regards to "the timing and nature of the required hearing 'will depend on appropriate accommodation of the competing interests involved.' These include the importance of the private interest and the length or finality of the deprivations, the likelihood of governmental error, and the magnitude of the governmental interests involved." *Id.* at 434 (citations and footnote omitted).

2. Due Process Right to a Fair and Impartial Tribunal –

As a matter of federal procedural due process, it is written in stone that the Plaintiff is entitled to a fair and impartial trial and tribunal in the underlying Case as on

as well on Disqualification. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *In re Murchison*, 349 U.S. 133 (1955); *Tumey v. Ohio*, 273 U.S. 510 (1927). Specifically, a "fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." *In re Murchison*, 349 U.S. at 136. A fair trial means that the judge is "require[d] to be impartial in weighing the evidence presented before him [or her]. . . ." *Id.* at 138. "Every procedure which would offer a possible temptation to the average [wo/]man as a judge to forget the burden of proof required . . . or which might lead him[/her] not to hold the balance nice, clear and true between . . . [the parties] denies . . . [them] due process of law." *Tumey*, 273 U.S. at 532.

Consequently, the State of Ohio has vested in the Plaintiff, and in every other litigant, a right to an impartial tribunal by making the Ohio Code of Judicial Conduct and the Ohio Code of Professional Responsibility binding upon the judiciary. OHIO R. GOV. JUD. I, § 1. This right is, of course, also enveloped by state procedural due process. OHIO CONST. art I, § 16. In Ohio, it is mandatory that "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." OHIO CODE JUD. CONDUCT Canon 2. In Ohio, it is mandatory that "[a] judge shall perform the duties of judicial office impartially and diligently." *Id.* at Canon 3. In Ohio, even the appearance of impropriety supports disqualification. *Id.* at Canon 3(E)(1); *see, e.g.*, *Volodkevich v. Volodkevich*, 35 Ohio St. 3d 152, 518 N.E.2d 1208 (1988) (same); *see generally* 22 OHIO JUR. 3D *Courts & Judges* §§ 113-26

(West 2006) (discussing purpose and grounds for disqualification).

Judicial ethics commentators have stated that "favoritism toward one of the parties to a suit is what constitutes disqualifying bias or prejudice." JEFFREY M. SHAMAN, STEVEN LUBET & JAMES J. ALFINI § 4.04 (3rd ed. 2000 & Supp. 2004) (citations omitted); *see also id.* at ch. 4 (discussing judicial disqualification and conflicts of interest); *see generally* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION (1996 & Supp. 2005) (only comprehensive treatise on entire topic).

3. Disqualification Under the Ohio Code of Judicial Conduct –

Ohio Judicial Canon 3(E) (Disqualification) provides as follows:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) The judge served as a lawyer in the matter in controversy, a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning the matter;
>
> (c) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has

an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;

(d) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Has acted as a judge in the proceeding;

(iv) Is known by the judge to have an economic interest that could be substantially affected by the proceeding;

(v) Is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge shall keep informed about the judge's personal fiduciary and economic interests and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

OHIO CODE JUD. CONDUCT Canon 3(E); *cf. id.* at 3(G) (disqualification of justices of the Ohio Supreme Court).

The Commentary to this Section states as follows:

E(1). Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in division (E)(1) of Canon 3 apply. For example, if a judge were in the process of negotiating for employment with a law firm,

the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

A judge should timely disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

E(1)(b). A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of division (E)(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

E(1)(d). The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Division (E)(1)(d)(iii) applies to appellate judges reviewing decisions rendered by them or a relative as defined in division

> (E)(1)(d) of this canon. It is not intended to prevent trial judges from hearing cases on remand, or that have been refiled after dismissal. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under division (E)(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under division (E)(1)(d)(iv) may require the judge's disqualification.

OHIO CODE JUD. CONDUCT Canon 3(E) (Commentary).

This Canon is modeled after the ABA Model Code of Judicial Conduct, which provides additionally that a judge should disqualify herself, when: "the judge knows or learns by means of a timely motion that a party or a party's lawyer has within the previous [***] year[s] made aggregate* contributions to the judge's campaign in an amount that is greater than [[[$***] for an individual or [$***] for an entity]]] [[is reasonable and appropriate for an individual or an entity]]." ABA MODEL CODE JUD. CONDUCT Canon 3(E)(1)(e) (2003) (footnote omitted; outside asterisks indicate defined terms by the ABA); *see also* ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 245-46 (2004) (discussing 1999 amendment that resulted in Canon 3(E)(1)(e)) [hereinafter ANNOTATED MODEL CODE]. Under the Final Draft Report, dated December 14, 2005, of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, *available at* www.abanet.org/judicialethics, this provision is preserved as new Canon 2, Rule 2.12(A)(4).

Ohio Judicial Canon 3(F) (Remittal of Disqualification) provides as follows:

> If, following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, jointly request that the judge should remit his or her disqualification, the judge may approve and participate in the proceeding. The request and approval shall be incorporated in the record of the proceeding.

OHIO CODE JUD. CONDUCT Canon 3(F); *cf. id.* at 3(H) (remittal of disqualification of justices of the Ohio Supreme Court).

The Commentary to this Section states as follows:

> A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

OHIO CODE JUD. CONDUCT Canon 3(F) (Commentary).

4. This Court Should Clarify Its Order and Judgment Entry Denying the Plaintiff's Affidavits of Disqualification, Because this Court's Opinion Does Not Fairly Set-Forth the Relevant Facts Presented by the Plaintiff –

This Court was required to explain its reasoning for denying the Plaintiff's Affidavits of Disqualification, OHIO

CONST. art. IV, § 2(C), yet as recited above, this Court omitted almost all of the material facts set-forth by the Plaintiff, which does not allow a future reader of this Court's Opinion to know what the factual basis was for the Plaintiff's Affidavits, and which does not allow the Plaintiff or a future reader of the same to know how this Court actually reached its conclusion that the Trial Court should not be disqualified, which is patently unfair to the Plaintiff.

Specifically, the Plaintiff presented evidence that (1) the Trial Court had failed to disclose the extraordinary political contributions made to it by the Defendants and their partners, that (2) the Trial Court had taken a personal interest in the underling [sic] Case, that (3) the Defendants and their partners were behaving as if they had purchased special favor with the Trial Court, where one of the Defendants had actually stated in sworn testimony that the Trial Court would issue a declaratory judgment in his favor at the then upcoming Trial, and that (4) the Trial Court had made numerous rulings in the underlying Case that were arbitrary and capricious, any and all of which would lead any objective observer to conclude that the Trial Court's "impartiality might reasonably be questioned" therein," all of which was unrebutted by the Trial Court, yet this Court did not specifically describe in its Opinion the full extent of the Plaintiff's proof. For example:

In regards to item number 1, this Court did not disclose that the Trial Court was requested on recusal to disclose her prior years contributions, which are no longer available at the Cuyahoga County Board of Elections, or that the Trial Court has still not disclosed the same. In fact, this Court did not even discuss the fact that the Trial

Court did not explain itself on recusal, or that the Trial Court did not even read the Plaintiff's recusal reply filed below.

In regards to item number 2, this Court did not discuss the unrebutted sworn testimony on this issue, which the Trial Court ignored, nor did it discuss the Trial Court's response thereto, which, if believed, would admit to having persons other than the Trial Court deciding motions pending before it.

In regards to item number 3, this Court did not discuss the evidence at all, when, for instance, it is certainly a material fact that PEB has testified to expecting the Trial Court to issue a ruling in his favor has if the outcome had been predetermined.

In regards to item number 4, this Court did not discuss the specific factual allegations, as if arbitrary and capricious rulings are not evidence on disqualification, which this Court has never so held. For instance, since when is an *impartial* court legitimately concerned about the "untoward impact an allegation of fraud in a purchase of securities would have on litigation of non-fraud claims. . . ." Trial Court's Order & Judgment Entry, dated June 29, 2005. The fact that juries don't like lawyers who aid-and-abet securities fraud is no reason to have denied the Plaintiff his right to present those claims along side *his exact same claims that these exact same lawyers committed legal malpractice in advising him to purchase the exact same securities*. This was nothing more and nothing less than helping B&H, because B&H had helped the Trial Court. Moreover, this Court did not address, let alone explain, that the Summit County Court of Common Pleas has now essentially "reversed" the Trial Court by transferring

the Legal Malpractice Case II back not just to Cuyahoga County but to the Trial Court's docket in the underlying Case, which is a *de facto* reverse inter-county case consolidation. Obviously, for the Summit County Court of Common Pleas to have taken such a rogue action must have been motivated by the irritation of the havoc caused by the Trial Court in refusing the Plaintiff his right for a first leave to amend his lawsuit.

Likewise, this Court omitted any detailed discussion of the allegations of the Plaintiff's and his Counsel's Affidavits. Even worse, this Court quoted the Plaintiff's Expert Witness Affidavit out-of-context to make it appear as if Expert Flamm actually agreed with this Court's conclusion, when he did not.

This Court omitted any discussion of this Court's, the Trial Court's, or even B&H's past statements about campaign contributions, all of which are material facts.

Finally, this Court omitted the Trial Court's admissions made in its Response, which were material: In paragraph fourteen (¶14) of its letter that "members of the public may assume or suspect a judge's decisions in individual cases are driven by campaign contributions"; In paragraph sixteen (¶16) of her letter that it "appreciate[s] that members of the public may assume or suspect a judge's decisions in individual cases are driven by campaign contributions"; and In paragraph nineteen (¶19) of its letter that it "do[es] not care whether this [C]ase stays on my docket or it is removed. There are advantages and disadvantages to either action." This Court also avoiding discussing any of the omissions by the Trial Court, which are set-out in detail, above.

It is beyond contention that this Court needs to, at the very least, clarify its Opinion, so that the same fairly sets-forth the relevant facts presented by the Plaintiff, and, if necessary, the Plaintiff hereby moves this Court to issue findings of fact and conclusions of law. OHIO R. CIV. P. 52.

5. This Court Should Clarify Its Order and Judgment Entry Denying the Plaintiff's Affidavits of Disqualification, Because this Court Did Not Affirmatively Address Whether or Not It Was Subject to Disqualification and Should Have Recused Itself from Hearing these Affidavits –

In Ohio, disqualification of lower court judges is vested in the Chief Justice. OHIO CONST. art. IV, § 5(C), but there is no disqualification procedure for members of the Ohio Supreme Court, who are expected to self-disqualify, when required to do so. OHIO CODE. JUD. CONDUCT Canon 3(G); *see generally* 22 OHIO JUR. 3D *Courts & Judges* § 116 (West 2006) (discussing same).

As the Plaintiff's Counsel averred in his Affidavit:

> As set-out in the recusal motion papers, the Chief Justice has received a very large amount of campaign contributions from Baker & Hostetler LLP, its Ohio PAC, and its partners, and I would merely suggest that the Chief Justice consider whether or not he can be impartial herein. After a lot of consideration on the topic, neither I nor my Client will ask the Chief Justice to recuse himself from hearing this disqualification request, and we trust the Chief Justice to voluntarily recuse himself, if he feels that past contributions would impact his decision; likewise, if he does not, then we trust him to rule on this request impartially and without regard to

> past campaign contributions, and we will live with his sound judgment either way.

Plaintiff's Counsel's Affidavit of Disqualification, at ¶6.

As set-out in the Plaintiff's Affidavit of Disqualification, at Spreadsheet Exhibits, the Chief Justice has received at least $26,900 from B&H, its PAC, and its partners, the majority of which was given in his last election, where the B&H, its PAC, and some thirty-two (32) of its partners, made contributions thereto.

While the Plaintiff placed his trust in this Court to decide this disqualification matter fairly, given this Court's recent public testimony on the topic, as well as the Chief Justice's integrity on this issue, as set-out in his on-line CV, which is available at www.sconet.state.oh.us/justices/moyer, the Plaintiff was clearly concerned about the shear magnitude of the amount and number of contributions made by the Defendants and related parties, and with all due respect, *this Court had an obligation to explain on the record whether or not it could be fair and impartial herein*. Specifically, "[a] judge should timely disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." OHIO CODE JUD. CONDUCT Canon 3(E) (Commentary). This Court has repeatedly held that the failure of a judge to respond to an affidavit of disqualification creates a disqualifiable appearance of impropriety. *E.g.*, *In re Disqualification of Corrigan*, 94 Ohio St. 3d 1234, 1235, 763 N.E.2d 602, 603 (2001). This Court must lead by example, and the appearance of impropriety is exactly the same to the Plaintiff, when this Court ignores what so obviously needed to be addressed,

and when this Court issues an Opinion that so misstates the facts presented on disqualification.

Given the fact that this Court's failure to establish a mechanism and procedure to disqualify Ohio Supreme Court Justices clearly implicates federal and state due process concerns, and given the fact that this Court clearly knows how to establish the same, when its own interests are concerned, *cf.* OHIO R. GOV. JUD. II, § 4 (disqualification of Ohio Supreme Court in regards to disciplinary complaints against the same), this Court has an even higher burden here to explain itself. Instead, this Court's Opinion merely alludes to an allegation without further explanation or justification, which does not satisfy the rules, sets a bad example, and hardly gives the Plaintiff any confidence that this Court was fit to hear this matter, when he looks at this Court's failure to address almost any of the issues on the merits after full discussion of the relevant facts presented.

Just like with the allegations against the Trial Court, this pay-to-play mentality is exactly why the ABA amended Canon 3(E) to include mandatory disclosure and disqualification over certain threshold contribution limits. *See* ANNOTATED MODEL CODE, *supra*, at 206-07 (discussing campaign contributions and noting that judges were already encouraged before the amendment to disclose if a party had contributed to his or her campaigns – especially if the amounts were extraordinary). And even without that specific language in Ohio's Code, this conduct still gives rise to a situation where this Court's "impartiality might reasonably be questioned," OHIO CODE JUD. CONDUCT. Canon 3(E)(1), which this Court specifically recognized in *In re Disqualification of Horvath*, 2004-Ohio-7356, 105 Ohio St. 3d 1247, 826 N.E.2d 305 (2004), where the neither the size,

timing, nor circumstances of delivery, of a $400 campaign contribution by *opposing counsel* was found sufficient to warrant disqualification. *Id.* at ¶12. Here, we are dealing with campaign contributions to both the Trial Court and to this Court by *parties* to the underlying Case, whether *de facto* or *de jure* at this point in time.

According to a leading commentator on judicial disqualification, who is the Plaintiff's Expert Witness herein:

> The practice of accepting gifts or favors from parties implicates fundamental policy concerns. Parties are usually not permitted to give such gifts or favors, and judges are usually not permitted to accept them. Indeed, even favors that were bestowed on a judge by a person before he or she became a party before that judge may raise concerns sufficient to warrant judicial disqualification in certain circumstances.

RICHARD E. FLAMM, *supra*, § 6.2.2 (footnotes omitted); *cf. id.* § 6.4.1 (discussing propriety of campaign contributions); *see also* JEFFREY M. SHAMAN, STEVEN LUBET & JAMES J. ALFINI, *supra*, § 11.12 (discussing disqualification implications of campaign support or opposition).

This is serious stuff: This Court has testified to the impact of money on the reputation of the Ohio judicial system, and just recently, the Cleveland Plain Dealer Editorial Page called Ohio "a state that's a national symbol of courts for sale." Editorial Opinion, *Ohio Supreme Court*, CLEVELAND PLAIN DEALER, Apr. 6, 2006, at B-8.

Quite frankly, the buck stops on this issue with the Chief Justice, and he will set the example to be followed by other justices and judges in Ohio. With all due respect,

this Court brushed aside an issue, which it had both a moral and legal obligation to address head on. Instead, the Opinion, as written, does nothing but encourage judges to ignore money in politics, which is neither sound judicial ethics nor sound public policy. The Plaintiff cannot move to disqualify this Court from hearing this Motion, because no such procedure exists, but if this Court refuses to clarify its Opinion here, the Plaintiff hereby moves this Court to recuse itself for the reasons discussed above.

6. ***This Court Should Reconsider Its Order and Judgment Entry Denying the Plaintiff's Affidavits of Disqualification, Because this Court's Opinion Misapplied the Facts Presented, Incorrectly Applied the Objective Legal Standard of Disqualification, and Ignored the Subjective Legal Standard of Disqualification. In Addition, this Court, When Squarely Faced with the Larger Constitutional Question of How to Balance Judicial Campaigning and Free Speech against a Litigant's Due Process Rights Chose to Ignore the Question Altogether –***

Basically, this Court has denied disqualification, because it has chosen to believe the Response of the Trial Court over the Plaintiff's Affidavits of Disqualification, which this Court states would be believed by a reasonable and objective observer. Moreover, this Court believes that the Trial Court has explained away its failure to disclose its significant campaign contributions by a *party* to the underlying Case. In so finding, this Court ignores the Trial Court's obligation to have explained herself below, OHIO CODE JUD. CONDUCT Canon 3(E) (Commentary), and it ignores the Trial Court's responsibility for her judicial campaign fundraising. OHIO SUP. CT., Bd. of Comm'rs on Grievances and Discipline, Informal Op. 8 (2002) ("Guideline

10: Judicial candidates are responsible for the contents of their campaign communication and for the compliance of their campaign committee with the restrictions on solicitation and contributions."). Even more amazing is that this was in the face of the Trial Court's admission that it hand wrote thank you notes to B&H and its partners for their campaign contributions, even though it had no current recollection of the same. And as alluded to above, this was in the context of the Trial Court refusing to explain herself below, which in-and-of-itself created a disqualifiable appearance of impropriety. *E.g.*, *In re Disqualification of Corrigan, supra*.

As discussed above, this Court has ignored almost all of the facts presented by the Plaintiff regarding the Trial Court's long-time relationship with B&H and its partners, not to mention all of the other specific factual allegations, all of which is discussed in detail above and collectively called for disqualification. Worse still, this Court has ignored its own testimony, as well as the admissions by the Trial Court, regarding the impression that contributions give to the public.

The Chief Justice, who is a sophisticated person, may believe the Trial Court, but his subjective belief is not the test. According to the 2000 U.S. Census, the per capita income in Ohio was $21,003, and the median household income was $40,956. This is a picture of the average Ohioan, who would be shocked to learn that a party to a lawsuit had given either $8,300 to the Trial Court or over three (3) times that amount to the Chief Justice. As stated above, if this Court publishes its Opinion "as is," it will be encouraging justices and judges to completely ignore the impact of campaign finances on their judicial duties, simply because judicial elections in Ohio are politically

financed, and this Court will be essentially opening the floodgates to making the appearance of Ohio's judicial system even worse than it already is.

When this Court has already had to suspend various provisions of the Ohio Code of Judicial Conduct due to federal litigation, this Court cannot put its head in the sand, when the only remaining protection left is disqualification/recusal in regards to the public's and litigants' perceptions of the Ohio judicial system.

From this vantage point, this Court's disposition of the Plaintiff's Affidavits of Disqualification is hard to understand, because this Court did not even follow the precedents that it has established.

In its Response, the Trial Court conceded that parties who learn that a judge has received campaign donations from an adversary may reasonably become concerned about the impartiality of the judge. While Trial Court denied that it possesses the bias and prejudice that the Plaintiff suspects, the Trial Court did not deny having received significant campaign donations from B&H. Nor did it suggest that the sums it received from B&H would not be sufficient to cause a reasonable person to question her fairness and impartiality. Finally, and perhaps most significantly, the Trial Court did not claim that any party, or even itself, would be prejudiced or seriously inconvenienced, in any way, if the Plaintiff's request was honored and the underlying Case was transferred to a different Cuyahoga County Judge. Instead, the Trial Court stated that there were advantages to disqualification, even though it never described them.

In evaluating the merits of the recusal motion, this Court recognized that the disposition of the Plaintiff's

Affidavits of Disqualification turned on whether the allegations set forth therein as well as in the Trial Court's Response would raise the specter of an appearance of bias. As the Eighth Circuit Court of Appeals recently recognized, however, the "appearance of bias" standard – while well established in the jurisprudence – is inherently vague. *Jones v. Luebbers*, 359 F.3d 1005, 1012 (8th Cir. 2004), *cert. denied sub nom. Jones v. Roper*, 543 U.S. 1027 (2004).

One of the things that makes the standard vague is that the relevant judicial disqualification provisions, while prescribing disqualification for appearances, generally neglect to specify how an appearance of bias is to be determined. *See, e.g., SCA Servs., Inc. v. Morgan*, 557 F.2d 110, 115 (7th Cir. 1977). As a result, there has been substantial divergence of opinion as to the proper vantage point for determining such an appearance – should questions about a judge's impartiality be answered from the standpoint of the moving party, a "reasonable" person, or the challenged judge herself?

Here, it appears that this Court gave considerable weight to the Trial Court's own subjective opinion that it is not biased. Likewise, this Court expressly concluded that a "reasonable and objective observer" would not "hold serious doubts" about the Trial Court's ability "to serve fairly and impartially in this case." Conversely, this Court does not appear to have given any credence whatsoever to the fact that the Plaintiff and his Counsel testified that they sincerely believe that they cannot receive a fair trial from the Trial Court. This is in addition to the point made above, that this Court should have viewed the Trial Court's failure to respond to the recusal motion as conclusive of its unfairness and partiality. *In re Disqualification of Corrigan, supra.*

This is surprising, because in another recent case, this Court indicated that, while a judge's own assessment is entitled to "some weight," its "subjective belief as to [its] own impartiality is generally not the decisive factor in deciding a disqualification request." *In re Disqualification of Lewis*, 2004-Ohio-7359, ¶11, 105 Ohio St. 3d 1239, 1241, 826 N.E.2d 299, 300 (2004). Other courts have put the matter more forcefully. For example, the Sixth Circuit Court of Appeals has stated that, in determining whether an appearance of impropriety sufficient to warrant recusal exists, a judge is not to rely on his own assessment of his ability to conduct the case impartially. *Traficant v. Comm'r*, 884 F.2d 258, 267 (6th Cir. 1989).

If the Trial Court's subjective opinion as to its impartiality was not the "decisive factor" in this Court's decision to deny disqualification, then the decisive factor must surely have been this Court's conviction that a "reasonable and objective observer" would not doubt the Trial Court's fairness and impartiality. Like the "appearance of bias" test, however, the "reasonable person standard" is somewhat nebulous. As a Northern District of Ohio judge once poignantly noted, it "is not as easy as the Congress and the Court of Appeals seem to think it is to determine what a 'reasonable person knowing all the relevant facts' would think about anything, much less about the impartiality of a judge." *Roberts v. Ace Hardware, Inc.*, 515 F. Supp. 29, 30 (N.D. Ohio 1981). As discussed above, what this Court thinks a reasonable Ohioan would think about money and politics does not jibe with the income levels of that average Ohioan, and, instead, indicates that this Court substituted its own subjective view under the guise of using a reasonable person test.

However, whereas federal courts, and appellate courts in many (but not all) other states, determine whether a

disqualifying "appearance of bias" exists exclusively with reference to the "reasonable person" standard – Ohio does not. On the contrary, as this Court recently explained in another case, "[a]s this [C]ourt first said more than seven decades ago, 'it is of vital importance that the litigant believe that he will have a fair trial.'" *In re Disqualification of Celebrezze*, 2004-Ohio-7360, ¶4, 105 Ohio St. 3d 1241, 1242, 826 N.E.2d 301, 301 (2004) (quoting *State ex rel. Turner v. Marshall*, 123 Ohio St. 586, 587, 176 N.E. 454, 455 (1931)); *see also In re Disqualification of Squire*, 2004-Ohio-7358, ¶8, 105 Ohio St. 3d 1221, 1223, 826 N.E.2d 285, 286 (2004) ("Undoubtedly, '[i]t is of vital importance that the litigant should believe that he will have a fair trial,' and in this case, it seems fair to say that affiant no longer holds that belief") (quoting *State ex rel. Turner v. Marshall, supra*)).

In fact, as this Court further explained in *Celebrezze*, even "[t]hough none of [the Trial Court's] words or actions suggest that [it] is biased or prejudiced, this is a case in which [its] removal is necessary 'to avoid even an appearance of bias, prejudice, or impropriety, and to ensure the parties, their counsel, and the public the unquestioned neutrality of an impartial judge.'" *In re Disqualification of Celebrezze, supra*, at ¶4 (quoting *In re Disqualification of Floyd*, 2003-Ohio-7354, ¶10, 101 Ohio St. 3d 1215, 1217, 803 N.E.2d 816, 818 (2003)).

Celebrezze is instructive not only because that case constitutes this Court's most recent affirmation of the importance of ensuring that, apart from what the public or an objective observer might think, what a *litigant* believes regarding whether or not he will have a fair trial is equally important, but because the facts of that case are so similar to those of this one in a very fundamental respect: Judge Celebrezze – just like Judge Burnside – filed a

response in which he controverted the moving party's allegations of bias, and also in which he attested that he was "prepared to address the case fairly and impartially." *Id.* at ¶3. So what is the difference here?

These were not isolated decisions but constitute the longstanding disqualification jurisprudence established by this Court regarding the importance of ensuring the parties and their counsel – not just the public at large – of the unquestioned neutrality of an impartial judge. *See In re Disqualification of Corrigan, supra*, 94 Ohio St. 3d at 1235, 763 N.E.2d at 603 (" . . . I conclude that Judge Corrigan should be disqualified from the underlying case in order to avoid the appearance of impropriety and to ensure the parties' and the public's confidence in the fairness and integrity of these proceedings."); *In re Disqualification of Sheward*, 77 Ohio St. 3d 1258, 1260 (1996), 674 N.E.2d 365, 366 ("To avoid the appearance of impropriety *and to ensure the parties' absolute confidence in the fairness of these proceedings*, I conclude that Judge Sheward should be disqualified from this case") (emphasis added)); *In re Disqualification of Shattuck*, 74 Ohio St. 3d 1244, 1244, 657 N.E.2d 1349, 1349 (1993) ("Although the record fails to support a finding that Judge Shattuck could not fairly and impartially rule on the issues that will be raised in the remand hearing, Judge Shattuck should be disqualified in order to avoid the appearance of impropriety *and to ensure the parties' absolute confidence in the proceedings*") (emphasis added)).

As set-out in detail above, the Plaintiff and his Counsel submitted Affidavits and unrebutted evidence attesting to their strong belief that the Trial Court is biased and prejudiced against them, and that they do not believe that they can get a fair and impartial trial. Both the Trial Court and this Court have stated that the Plaintiff's and his Counsel's

beliefs about the campaign contributions are, in fact, reasonable and generally shared by other Ohioans. Yet this Court not explained why the Plaintiff's and his Counsel's reasonable beliefs and reasonable fears are not entitled to the same protections that this Court has afforded to so many other litigants before them. Again, so what is the difference here?

This is especially hard to understand, when the Trial Court stated that there would actually be advantages to its disqualification, upon which the Trial Court did not elaborate, and about which this Court chose to omit from its Opinion. How could this Court omit this admission from its Opinion, and how could this Court refuse to explain why it was denying recusal, when there were admitted grounds for the same? Nowhere did this Court state that the Plaintiff's and his Counsel's beliefs and fears were unreasonable or unfounded, because it could not in the face of the Trial Court's admissions as well as this Court's own public testimony on the topic.

Other judges have also acknowledged the reasonable apprehension people may have when they learn that opposing sides have financed the judges in their cases. *See, e.g., Republican Party of Minn. v. White*, 536 U.S. 765, 790 (2002) (O'CONNOR, J., concurring) ("[R]elying on campaign donations may leave judges feeling indebted to certain parties. . . . Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary" (citations omitted)).

In addition, neither the Trial Court not this Court has identified any prejudice that would result from granting the Plaintiff's Affidavits of Disqualification, and, in fact, the Trial

Court admitted that there would be advantages to doing so, and that it did not care if the underlying Case stayed on its docket, which this Court omitted from its Opinion.

This Court is well aware of the havoc that has been caused by the *White* case, *supra*, which placed free speech rights over judicial ethics and regulation, and it should be aware that the only counter-weight to this mischief in the short-run is to enforce litigants' due process rights via disqualification/recusal. There are few things the Chief Justice could do for the remainder of his term that would be more important than to forcefully address and formulate the states' vanguard response to *White*. This Court has an opportunity to bring respect back to the Ohio judicial system by imposing in disqualification the ABA's standards, so that anyone attempting to pay-to-play would find out that s/he were precluded from playing in a court to which a party or its attorneys had made aggregate campaign contributions in excess of a reasonable amount within a reasonable time-frame. Why this Court has ignored its opportunity to advance a cause it has championed calls into question whether or not this Court truly wants to reform a judicial elections process that it has spoken out against.

7. ***If this Court Chooses to Deny the Plaintiff's Motion for Reconsideration, in the Alternative, this Court Should Continue the Stay of the Underlying Case, So that the Plaintiff May File a Petition for a Writ of Certiorari with the United States Supreme Court Seeking a Review of these Orders and Judgment Entries –***

If this Court chooses not to grant the Plaintiff's Motions herein, there can be no doubt that these issues

presented herein are of fundamental constitutional importance, and the Plaintiff would respectfully request that this Court continue the stay in this Case, so that the Plaintiff may file a petition for a writ of certiorari with the United States Supreme Court seeking a review of these Orders and Judgment Entries at issue herein.

D. The Conclusion –

In conclusion, and for the foregoing reasons, this Court should GRANT the Plaintiff's Motion for Clarification and/or Reconsideration of his Affidavits of Disqualification, or in the alternative, his Motion to Continue the Stay Pending a Petition for Writ of Certiorari.

Respectfully submitted,

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[dated: 4/7/06]

* * *

28 U.S.C. § 144 (bias or prejudice of judge):

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

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28 U.S.C. § 455 (disqualification of justice, judge, or magistrate):

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about

the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

ALA. CODE §§ 12-24-1 & 2 (West 2006):

§ 12-24-1 (Recusal of justice or judge due to campaign contributions):

The Legislature intends by this chapter to require the recusal of a justice or judge from

hearing a case in which there may be an appearance of impropriety because as a candidate the justice or judge received a substantial contribution from a party to the case, including attorneys for the party, and all others described in subsection (b) of Section 12-24-2. This legislation in no way intends to suggest that any sitting justice or judge of this state would be less than fair and impartial in any case. It merely intends for all the parties to a case and the public be made aware of campaign contributions made to a justice or judge by parties in a case and others described in subsection (b) of Section 12-24-2.

§ 12-24-2 (Filing by judges, justices, parties, and attorneys of disclosure statements concerning campaign contributions):

(a) Any justice or judge of an appellate or circuit court of this state shall file, at least two weeks prior to the commencement of his or her term of office, with the Secretary of State, a statement disclosing the names and addresses of campaign contributors and the amount of each contribution made to him or her in the election immediately preceding his or her new term in office. Contributions from political action committees may be accepted if the committee furnishes to the Secretary of State according to existing law a list of names and addresses of contributors and an amount properly attributable to each contributor. When a justice or judge does not file this annual statement, the Secretary of State shall notify the Administrative Office of Courts and that office shall withhold further compensation to the justice or judge pending compliance with this section.

(b) The Supreme Court shall provide under the appropriate rules of court, a rule or rules which provide as follows: In an appellate court proceeding the attorneys for all parties shall serve certificates of disclosure on all attorneys of record before such court within 28 days after the filing of the notice of appeal; or in a circuit court within 28 days after notice of the identity of the judge presiding on the case. Each certificate shall state the amount, if any, of campaign contributions by the respective individual donor or entity to any justice or judge of an appellate court where the case is pending, or if it is a trial court proceeding, the amount, if any, of campaign contributions by the respective individual donor or entity to the judge presiding over the case, made in the last election by the party or real parties in interest, any holder of five percent (5%) or more of a corporate party's stock, any employees of the party acting under that party's direction, any insurance carrier for the party which is potentially liable for the party's exposure in the case, the attorney for the party, other lawyers in practice with the attorney, and any employees acting under the direction of the attorney or acting under the direction of those in practice with the attorney. The failure to file the certificates of disclosure within the time frames set out above shall not affect the validity of the filing but the court may impose sanctions provided for by Rule 37(b)(2)(C, D) of the Alabama Rules of Civil Procedure, for the failure of a party to comply with this section after being ordered to do so.

(c) The action shall be assigned to a justice or judge regardless of the information contained in the certificates of disclosure. If the action is assigned to a justice or judge of an appellate

court who has received more than four thousand dollars ($4,000) based on the information set forth in any one certificate of disclosure, or to a circuit judge who has received more than two thousand dollars ($2,000) based on the information set out in any one certificate of disclosure, then, within 14 days after all parties have filed a certificate of disclosure, any party who has filed a certificate of disclosure setting out an amount including all amounts contributed by any person or entity designated in subsection (b), below the limit applicable to the justice or judge, or an amount above the applicable limit but less than that of any opposing party, shall file a written notice requiring recusal of the justice or judge or else such party shall be deemed to have waived such right to a recusal. Under no circumstances shall a justice or judge solicit a waiver of recusal or participate in the action in any way when the justice or judge knows that the contributions of a party or its attorney exceed the applicable limit and there has been no waiver of recusal.

OHIO REV. CODE ANN. § 2101.39 (West 2006):

If a probate judge allegedly has a bias or prejudice for or against a party or a party's counsel in a proceeding pending before the judge, allegedly otherwise is interested in a proceeding pending before the judge, or allegedly is disqualified to preside in the proceeding and if the bias, prejudice, interest, or disqualification does not permit or require certification of the proceeding to the court of common pleas as provided by section 2101.38 of the Revised Code, any party to the proceeding or the party's counsel may file an affidavit of disqualification with the clerk of the

supreme court. The affidavit of disqualification shall be filed and decided in accordance with divisions (B) to (E) of section 2701.03 of the Revised Code, and, upon the filing of the affidavit, the provisions of those divisions apply to the affidavit, the proceeding, the judge, and the parties to the proceeding.

OHIO REV. CODE ANN. § 2501.13 (West 2006):

If a judge of the court of appeals allegedly is interested in a proceeding pending before the court in a county of the judge's district, allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the court or a party's counsel, allegedly presided in the lower court in the same proceeding, or allegedly otherwise is disqualified to preside in a proceeding pending before the court, any party to the proceeding or the party's counsel may file an affidavit of disqualification with the clerk of the supreme court. The affidavit of disqualification shall be filed and decided in accordance with divisions (B) to (E) of section 2701.03 of the Revised Code, and, upon the filing of the affidavit, the provisions of those divisions apply to the affidavit, the proceeding, the judge, and the parties to the proceeding.

OHIO REV. CODE ANN. § 2701.03 (West 2006):

(A) If a judge of the court of common pleas allegedly is interested in a proceeding pending before the court, allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the court or a party's

counsel, or allegedly otherwise is disqualified to preside in a proceeding pending before the court, any party to the proceeding or the party's counsel may file an affidavit of disqualification with the clerk of the supreme court in accordance with division (B) of this section.

(B) An affidavit of disqualification filed under section 2101.39 or 2501.13 of the Revised Code or division (A) of this section shall be filed with the clerk of the supreme court not less than seven calendar days before the day on which the next hearing in the proceeding is scheduled and shall include all of the following:

(1) The specific allegations on which the claim of interest, bias, prejudice, or disqualification is based and the facts to support each of those allegations or, in relation to an affidavit filed against a judge of a court of appeals, a specific allegation that the judge presided in the lower court in the same proceeding and the facts to support that allegation;

(2) The jurat of a notary public or another person authorized to administer oaths or affirmations;

(3) A certificate indicating that a copy of the affidavit has been served on the probate judge, judge of a court of appeals, or judge of a court of common pleas against whom the affidavit is filed and on all other parties or their counsel;

(4) The date of the next scheduled hearing in the proceeding or, if there is no hearing scheduled, a statement that there is no hearing scheduled.

(C)(1) Except as provided in division (C)(2) of this section, when an affidavit of disqualification is presented to the clerk of the supreme court for filing under division (B) of this section, all of the following apply:

(a) The clerk of the supreme court shall accept the affidavit for filing and shall forward the affidavit to the chief justice of the supreme court.

(b) The supreme court shall send notice of the filing of the affidavit to the probate court served by the judge if the affidavit is filed against a probate court judge, to the clerk of the court of appeals served by the judge if the affidavit is filed against a judge of a court of appeals, or to the clerk of the court of common pleas served by the judge if the affidavit is filed against a judge of a court of common pleas.

(c) Upon receipt of the notice under division (C)(1)(b) of this section, the probate court, the clerk of the court of appeals, or the clerk of the court of common pleas shall enter the fact of the filing of the affidavit on the docket of the probate court, the docket of the court of appeals, or the docket in the proceeding in the court of common pleas.

(2) The clerk of the supreme court shall not accept an affidavit of disqualification presented for filing under division (B) of this section if it is not timely presented for filing or does not satisfy the requirements of divisions (B)(2), (3), and (4) of this section.

(D)(1) Except as provided in divisions (D)(2) to (4) of this section, if the clerk of the supreme court accepts an affidavit of disqualification for filing under divisions (B) and (C) of this

section, the affidavit deprives the judge against whom the affidavit was filed of any authority to preside in the proceeding until the chief justice of the supreme court, or a justice of the supreme court designated by the chief justice, rules on the affidavit pursuant to division (E) of this section.

(2) A judge against whom an affidavit of disqualification has been filed under divisions (B) and (C) of this section may do any of the following that is applicable:

(a) If, based on the scheduled hearing date, the affidavit was not timely filed, the judge may preside in the proceeding.

(b) If the proceeding is a domestic relations proceeding, the judge may issue any temporary order relating to spousal support pendente lite and the support, maintenance, and allocation of parental rights and responsibilities for the care of children.

(c) If the proceeding pertains to a complaint brought pursuant to Chapter 2151. or 2152. of the Revised Code, the judge may issue any temporary order pertaining to the relation and conduct of any other person toward a child who is the subject of a complaint as the interest and welfare of the child may require.

(3) A judge against whom an affidavit of disqualification has been filed under divisions (B) and (C) of this section may determine a matter that does not affect a substantive right of any of the parties.

(4) If the clerk of the supreme court accepts an affidavit of disqualification for filing under divisions (B) and (C) of this section, if the chief justice

of the supreme court, or a justice of the supreme court designated by the chief justice, denies the affidavit of disqualification pursuant to division (E) of this section, and if, after the denial, a second or subsequent affidavit of disqualification regarding the same judge and the same proceeding is filed by the same party who filed or on whose behalf was filed the affidavit that was denied or by counsel for the same party who filed or on whose behalf was filed the affidavit that was denied, the judge against whom the second or subsequent affidavit is filed may preside in the proceeding prior to the ruling of the chief justice of the supreme court, or a justice designated by the chief justice, on the second or subsequent affidavit.

(E) If the clerk of the supreme court accepts an affidavit of disqualification for filing under divisions (B) and (C) of this section and if the chief justice of the supreme court, or any justice of the supreme court designated by the chief justice, determines that the interest, bias, prejudice, or disqualification alleged in the affidavit does not exist, the chief justice or the designated justice shall issue an entry denying the affidavit of disqualification. If the chief justice of the supreme court, or any justice of the supreme court designated by the chief justice, determines that the interest, bias, prejudice, or disqualification alleged in the affidavit exists, the chief justice or the designated justice shall issue an entry that disqualifies that judge from presiding in the proceeding and either order that the proceeding be assigned to another judge of the court of which the disqualified judge is a member, to a judge of another court, or to a retired judge.

OHIO REV. CODE ANN. § 2701.031 (West 2006):

(A) If a judge of a municipal or county court allegedly is interested in a proceeding pending before the judge, allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the judge or to a party's counsel, or allegedly otherwise is disqualified to preside in a proceeding pending before the judge, any party to the proceeding or the party's counsel may file an affidavit of disqualification with the clerk of the court in which the proceeding is pending.

(B) An affidavit of disqualification shall be filed under this section with the clerk of the court in which the proceeding is pending not less than seven calendar days before the day on which the next hearing in the proceeding is scheduled and shall include all of the following:

(1) The specific allegations on which the claim of interest, bias, prejudice, or disqualification is based and the facts to support each of those allegations;

(2) The jurat of a notary public or another person authorized to administer oaths or affirmations;

(3) certificate indicating that a copy of the affidavit has been served on the judge of the municipal or county court against whom the affidavit is filed and on all other parties or their counsel;

(4) The date of the next scheduled hearing in the proceeding or, if there is no hearing scheduled, a statement that there is no hearing scheduled.

(C)(1) Except as provided in division (C)(2) of this section, when an affidavit of disqualification is presented to the clerk of a municipal or county court for filing under division (B) of this section, the clerk shall enter the fact of the filing on the docket in that proceeding and shall provide notice of the filing of the affidavit to one of the following:

(a) The presiding judge of the court of common pleas of the county;

(b) If there is no presiding judge of the court of common pleas of the county, a judge of the court of common pleas of the county.

(2) The clerk of the municipal or county court in which a proceeding is pending shall not accept an affidavit of disqualification presented for filing under division (B) of this section if it is not timely presented for filing or does not satisfy the requirements of divisions (B)(2), (3), and (4) of this section.

(D)(1) Except as provided in divisions (D)(2) to (4) of this section, if the clerk of the municipal or county court in which a proceeding is pending accepts an affidavit of disqualification for filing under divisions (B) and (C) of this section, the affidavit deprives the judge of a municipal or county court against whom the affidavit was filed of any authority to preside in the proceeding until the judge who was notified pursuant to division (C)(1) of this section rules on the affidavit pursuant to division (E) of this section.

(2) A judge of a municipal or county court against whom an affidavit of disqualification has been filed under divisions (B) and (C) of this section may preside in the proceeding if, based on

the scheduled hearing date, the affidavit was not timely filed.

(3) A judge of a municipal or county court against whom an affidavit of disqualification has been filed under divisions (B) and (C) of this section may determine a matter that does not affect a substantive right of any of the parties.

(4) If the clerk of a municipal or county court accepts an affidavit of disqualification for filing under divisions (B) and (C) of this section, if the judge who is notified pursuant to division (C)(1) of this section of the filing of the affidavit of disqualification denies the affidavit pursuant to division (E) of this section, and if, after the denial, a second or subsequent affidavit of disqualification regarding the same judge and the same proceeding is filed by the same party who filed or on whose behalf was filed the affidavit that was denied or by counsel for the same party who filed or on whose behalf was filed the affidavit that was denied, the judge of a municipal or county court against whom the second or subsequent affidavit is filed may preside in the proceeding prior to the ruling, by the judge who is notified pursuant to division (C)(1) of this section, on the second or subsequent affidavit pursuant to division (E) of this section.

(E) If the clerk of a municipal or county court accepts an affidavit of disqualification for filing under divisions (B) and (C) of this section and if the judge who is notified pursuant to division (C)(1) of this section of the filing of the affidavit determines that the interest, bias, prejudice, or disqualification alleged in the affidavit does not exist, the judge who is so notified shall issue an entry denying the affidavit of disqualification. If

the judge who is notified pursuant to division (C)(1) of this section of the filing of the affidavit determines that the interest, bias, prejudice, or disqualification alleged in the affidavit exists, the judge who is so notified shall issue an entry that disqualifies the judge against whom the affidavit was filed from presiding in the proceeding and designate another judge of the municipal or county court, or of the court of common pleas, to preside in the proceeding in place of the disqualified judge.

OHIO CODE JUD. CONDUCT Canon 3(E) (Commentary):

E(l). Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in division (E)(1) of Canon 3 apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

A judge should timely disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order.

In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

E(1)(b). A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of division (E)(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

E(1)(d). The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Division (E)(1)(d)(iii) applies to appellate judges reviewing decisions rendered by them or a relative as defined in division (E)(1)(d) of this canon. It is not intended to prevent trial judges from hearing cases on remand, or that have been refiled after dismissal. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under division (E)(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under division (E)(1)(d)(iv) may require the judge's disqualification.

OHIO CODE JUD. CONDUCT Canon 3(F) (Commentary):

A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not

solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

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(1)

No. 06-53

FILED
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SUPREME COURT, U.S.

In The
Supreme Court of the United States

MR. JEFFREY F. JONES,

Petitioner,

v.

THE HONORABLE JANET R. BURNSIDE, JUDGE,

and

THE HONORABLE THOMAS J. MOYER,
CHIEF JUSTICE,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Ohio

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

In his Petition for a Writ of Certiorari, the Petitioner, Mr. Jeffrey F. Jones, respectfully prayed for this Supreme Court of the United States to grant a writ of certiorari to review the Ohio Supreme Court's refusal to disqualify the Trial Court from presiding over his underlying and pending legal malpractice case against the Defendants. Petition for a Writ of Certiorari, at 1, 30.

The Petition was filed July 10, 2006, it was received by the Clerk of this Court on July 12th, and it was docketed on July 13th. The Petition was served on the Respondents by Federal Express, and it was delivered to all of the Respondents on July 11th. The Petitioner notified the Respondents of the docketing of the same, on the forms provided by the Clerk's office, by United States First-Class Mail on July 17th (the same day he received the same from the Clerk's office).

The Petitioner has an obligation to keep this Court advised of new developments via supplemental briefs, especially when it is obvious that a suggestion of mootness will be made by the Respondents, *Board of License Commissioners of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985), which is why he has filed this Supplemental Brief.

STATEMENT OF THE CASE (New Information)

On July 13, 2006, the Trial Court recused herself from the underlying case, unreported (reprinted *infra* App. 1); and on July 14th, the Presiding & Administrative Judge of the Cuyahoga County Court of Common Pleas reassigned this case to the Honorable Peter J. Corrigan, unreported (reprinted *infra* App. 2). The Petitioner received notice of this on July 18th.

As stated in the Petition, the Trial Court refused to recuse herself on February 9, 2006, in regards to the Plaintiff's Motion for Recusal, which was filed February 1st, Petition for a Writ of Certiorari, at 1, 3-4, App. 14; and she did not even read the Plaintiff's Reply in Support of his Motion for Recusal, which was filed February 9th and

denied as moot February 13th. Petition for a Writ of Certiorari, at 3-4, App. 15, App. 43-44 (¶20).

The Trial Court did not choose to recuse herself, when the Plaintiff filed his Affidavits of Disqualification in the Ohio Supreme Court on February 17, 2006, or when he filed his Reply in Support thereof on March 17th, or when he filed his Motion for Clarification and/or Reconsideration of April 7th, all of which were denied by the Chief Justice of the Ohio Supreme Court, on March 17th & 21st and April 11th, respectively. Petition for a Writ of Certiorari, at 1, 7-9, App. 1-9.

The Trial Court did not choose to recuse herself, when the Legal Malpractice Case II was transferred back to Cuyahoga County and consolidated with the Legal Malpractice Case I on March 22, 2006. Petition for a Writ of Certiorari, at 3.

The Trial Court did not choose to recuse herself, when the Plaintiff filed a Motion for Reassignment of the transferred and consolidated Legal Malpractice Case II, which was filed on April 28, 2006, and which was denied by the Presiding & Administrative Judge on May 15th. She did not choose to recuse herself, when the Plaintiff filed a Motion for a Change of Venue of the transferred and consolidated Legal Malpractice Case II, which was filed on May 30th, and which was withdrawn by the Plaintiff on July 20th.

The Trial Court did not choose to recuse herself, when the Petitioner filed his Application for Stay herein on May 12, 2006, which was denied on May 22nd, or when he refiled his Application for Stay on May 24th, which was denied on June 26th. Petition for a Writ of Certiorari, at 1; Docket No. 05A1067.

The only discernable reason that the Trial Court finally recused herself within two days of being served with the Petition is that she is apparently now trying to moot the Petition before this Court, which is obvious from

reading her judgment entry of recusal (reprinted *infra* App. 1).[1]

REASONS WHY THE PETITION IS *NOT* MOOT

While this is a judicial disqualification Case, the remedies that the Petitioner would request on the merits, if this Court accepts it for review, should be obvious from his Questions Presented for Review, to wit, a judgment from this Court (1) holding unconstitutional Ohio's (and most other states')[2] failure to ensure and protect the Petitioner's Fourteenth Amendment substantive due process right to a fair and impartial trial judge and chief justice, by its failure to adopt ABA Model Code of Judicial Conduct Canon 3(E)(1)(e) (1999), which provides for disqualification and recusal related to campaign contributions by parties and their lawyers over a certain threshold, or by its failure to adopt any other like standard; and a judgment from this Court (2) holding unconstitutional Ohio's failure to ensure and protect the Petitioner's Fourteenth Amendment procedural due process right to be heard on his substantive due process right to a fair and impartial chief justice, by its failure to provide a procedural mechanism or process for disqualifying an Ohio Supreme Court justice, when it provides a method for seeking disqualification of all other types of judges.

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[1] If the Trial Court honestly believed in judicial economy as a rationale for recusal, then she would have recused herself in February of 2006, when the Motion for Recusal was made, or in March of 2006, when she made admissions to the Ohio Supreme Court that should have compelled her recusal, and when she made so many omissions thereto of relevant facts that it was obvious that she was being disingenuous. *See* Petition for a Writ of Certiorari, at App. 36-45.

[2] In his Petition for a Writ of Certiorari, at 24, the Petitioner noted that thirty-nine states elect their judges, *Republican Party of Minnesota v. White*, 536 U.S. 765, 790 (2002) (O'CONNOR, J., concurring), but according to Professor Peter A. Joy, some forty-two states elect their judges. Peter A. Joy, *A Professionalism Creed for Judges: Leading by Example*, 52 S.C. L. REV. 667, 672 & n.15 (2000-2001) (relying on data from the American Bar Association).

Certainly, the Petitioner would have asked this Court to order the disqualification of the Trial Court, but the scope of this Case is so much broader, because the Trial Court's recent recusal does not cure the fact that the Petitioner had to suffer a biased and prejudiced Trial Court from the filing of the Legal Malpractice Case I on December 30, 2003 until her recusal on July 13, 2006 – some two-and-one-half years later, and because that recusal does not cure the fact that the Petitioner had to suffer a biased and prejudiced Chief Justice of the Ohio Supreme Court, whose erroneous decision denying disqualification will be reported in the Ohio Cases. The Petitioner was deprived of his civil rights throughout this process, and the Trial Court's attempt to manipulate the jurisdiction of this Court by recusing herself now does not remedy these multi-year constitutional violations.

The Respondents caused real damage to the Petitioner by denying him his Fourteenth Amendment due process rights, as measured by substantially increased legal fees and expenses, by greatly increasing the time to get to final resolution on the underlying case, and by causing the Petitioner and his counsel to lose faith and trust in the fairness of the Ohio legal system, due to the Trial Court's numerous arbitrary and capricious rulings in the underlying case, and due to the Chief Justice of the Ohio Supreme Court's arbitrary and capricious denial of the Plaintiff's Affidavits of Disqualification – both of which are directly linked to the campaign contributions made to them by the Defendant Baker & Hostetler LLP, its Ohio PAC, and its partners, in the amounts of $8,300 and $26,900, respectively.

The remedy now is for this Court to order the State of Ohio to cure these constitutional defects in its judicial system, if it wishes to continue to rely upon an elected judiciary – and only someone standing in the Petitioner's shoes has standing to even address these issues. *Public Citizen, Inc. v. Bomer*, 274 F.3d 212, 217-19 (5th Cir. 2001) (public interest plaintiffs and attorneys on behalf of their future clients, who complained of generalized past and future appearance of impropriety in the Texas legal

system, due to its failure to have a disqualification and recusal standard related to campaign contributions to judges by parties and their lawyers, lacked standing, because they did not allege – let alone suffer – specific injuries in fact).

"The test for mootness 'is whether the relief sought would, if granted, make a difference to the legal interests of the parties.'" *McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc) (citation omitted). While the Petitioner does not know upon what basis the Respondents are expected to argue that this Case is now moot, it is *not* moot for at least the following reasons, all of which demonstrate that this Case would make a difference to the Petitioner's legal interests:

I. There Is Still a Live and Pending Case and Controversy Between the Parties

First, the underlying legal malpractice case between the Plaintiff and the Defendants is still pending, and there is still a live controversy between them. The Plaintiff does not know if the newly-assigned judge will stay on the case or recuse himself for some reason (the Plaintiff currently knows of no reason why he should); and either way, there is always the possibility that this new judge may be replaced before the underlying case proceeds to trial for a host of possible reasons. In any event, the Plaintiff is entitled that the Trial Court's replacement be untainted by campaign contributions made by the Defendant Baker & Hostetler LLP, its Ohio PAC, and its partners, yet the State of Ohio does absolutely nothing to inquire – let alone ensure – that this is so. As discussed in the Petition for a Writ of Certiorari, at 24, the only state that does is Alabama.

Whoever loses at trial is likely to appeal to the Cuyahoga County Court of Appeals, and the Plaintiff is entitled to have an appellate panel untainted by campaign contributions made by the Defendant Baker & Hostetler LLP, its Ohio PAC, and its partners, yet the State of Ohio does absolutely nothing to inquire – let alone ensure – that this

is so. Again, as discussed in the Petition for a Writ of Certiorari, at 24, the only state that does is Alabama.

And whoever loses on appeal is likely to petition the Ohio Supreme Court for a discretionary appeal, and the Plaintiff is entitled to have an Ohio Supreme Court untainted by campaign contributions made by the Defendant Baker & Hostetler LLP, its Ohio PAC, and its partners – which would be impossible, because through 2005, they have given the six Republican justices on the Ohio Supreme Court some $79,850.[3] Only one of these six justices falls below the Alabama financial threshold for disqualification.

In addition, it is possible that, for campaign contributions or other reasons, the Plaintiff would need to file another affidavit of disqualification in the underlying case in the future, and he would then be entitled to have a Chief Justice of the Ohio Supreme Court untainted by campaign contributions made by the Defendant Baker &

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[3] Campaign finance reports for county-wide elections are filed with the Cuyahoga County Board of Elections, which does not post them on its web site, and which discards them after one election cycle. As such, if one wants to investigate any contributions made to a specific judge, one has to make a public records request in person, wait for the records to be copied, and then examine them manually. Such reports for statewide elections are filed with the Ohio Secretary of State, who posts them on his office's web site, and multiple election cycles are searchable by candidate and contributor, among various other search options.

The Trial Court, when asked, refused to account for all of her contributions received from the Defendant Baker & Hostetler LLP, its Ohio PAC, and its partners prior to its last election cycle. Petition for a Writ of Certiorari, at App. 34, App. 39 (¶13), App. 55. Instead, she continued to solicit them. *Id.* at App. 38 (¶10).

The campaign finance information obtained about the Trial Court was presented in the underlying disqualification case, and it was obtained from the Trial Court's last county-wide election reports as well as from reports filed with the Ohio Secretary of State in regards to her unsuccessful run for a seat on the Ohio Supreme Court.

The campaign finance information obtained about the Ohio Supreme Court was presented in the underlying disqualification case, and it was obtained from reports filed with the Ohio Secretary of State.

Hostetler LLP, its Ohio PAC, and its partners – which would be impossible, because through 2005, they have given him some $26,900 (a number in excess of the per capita annual income in Ohio of $21,003, according to the 2000 U.S. Census).

As set out above, this issue is broader than just the Trial Court, and it goes to every judge or justice, who may eventually be called upon to hear the underlying case at trial or on appeal. *See Suster v. Marshall*, 149 F.3d 523, 527-28 (6th Cir. 1998) (judicial candidate's injunctive relief was not moot, even though the election had transpired, because the same or other candidates could face the same problem in the future), *cert. denied*, 525 U.S. 1114 (1999). Here, Ohio has done nothing to ensure that any future judges or justices will be free from campaign contribution induced bias and prejudice in favor of the Defendant Baker & Hostetler LLP, even though the Plaintiff unquestionably has a right to a fair and impartial judge or justice at every stage of the proceedings.

II. The Trial Court Is Trying to Insulate the Ohio Supreme Court's Ruling in her Favor from Further Review by this Court

Second, this Court has an "interest in preventing litigants from attempting to manipulate [its] jurisdiction to insulate a favorable decision from review," *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000), and it is obvious that the Trial Court is trying to do just that by recusing herself now.

Moreover, the Trial Court's voluntary cessation of its illegal conduct, i.e., sitting in a case, where she was biased and prejudiced, is almost never enough to moot a case. *See, e.g., United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968) ("Mere voluntary cessation of allegedly illegal conduct does not moot a case. . . .").[4]

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[4] This Court may recall that the Petitioner asked it on two occasions to stay the underlying case, but it refused to do so, Docket No.

(Continued on following page)

III. This Case Is Clearly Capable of Repetition, Yet Evading Review, If this Case Were Otherwise Deemed Moot

Third and finally, the campaign contribution/disqualification and recusal nexus[5] in this Case is clearly capable of repetition, yet evading review, if this Case were to be otherwise deemed moot, because, in addition to Section I, *supra*, "[m]ore than 3.1 million cases were filed in Ohio courts just in 2005: 2,444 in the [Ohio] Supreme Court; 11,477 in the courts of appeals; 229,352 in the courts of common pleas, general division; 77,888 in the domestic relations courts; 93,708 in the probate courts; 253,245 in the juvenile courts; 2,265,931 in the municipal courts (including 1,216,460 non-O.V.I. traffic cases); 204,019 (including 132,969 non-O.V.I. traffic cases) in the county courts; and 1,138 in the Court of Claims." Introduction by Chief Justice Thomas J. Moyer, Ohio Courts Summary Report (May 2006).[6] As such, this pay-to-play problem is not just likely to occur again, it is guaranteed to occur on a

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05A1067 – as did the Ohio Supreme Court, when it denied his Motion to Continue the Stay Pending a Petition for a Writ of Certiorari. Petition for a Writ of Certiorari, at 1, App. 8-9.

During the disqualification proceedings below, the underlying case was automatically stayed pursuant to Ohio law. OHIO REV. CODE ANN. § 2701.03(D)(1) (West 2006). This statute is reprinted in the Petition for a Writ of Certiorari, at App. 79.

[5] *See* Joy, *supra* note 2, at 671-82 (discussing the unprofessionalism of some judges, public opinion of judges and judicial integrity, the inadequacy of existing judicial disqualification standards, efforts to reform judicial selection processes, and the ethical behavior and civility of judges); *id.* at 692-95 (discussing proposals for improving professionalism by improving the professionalism of the judiciary, and the need to establish better recusal standards).

[6] Report available at www.sconet.state.oh.us/publications/annrep/05OCS/default.asp.

The latest report available nationally covers the year 2003, and it indicates that the total number of cases filed in state courts that year was approximately 100,100,000! Examining the Work of State Courts, 2004: A National Perspective from the Court Statistics Project, available at www.ncsconline.org/D_Research/csp/CSP_Main_Page.html.

regular basis in most, if not all, of the courtrooms in Ohio[7] – not to mention the thirty-eight (or forty-one) other states, where judges are elected.[8]

Moreover, as the Fifth Circuit has said, only someone in the Petitioner's shoes, who has actually suffered an injury in fact by way of a biased and prejudiced judge and chief justice, has standing to even challenge this gross distortion in the Ohio judicial system.[9] *Public Citizen, supra*, 274 F.3d at 217-19.

The answer to this vexing problem is not hard, it was first suggested by a Stanford Law Review student note in 1988,[10] it was put into action by the State of Alabama in

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[7] The American Judicature Society has a concise description of judicial selection in Ohio on its web page, which is available at www.ajs.org/js/OH.htm. According to the AJS, the Chief Justice of the Ohio Supreme Court has known since at least 1994, from a poll that he commissioned through his Citizens' Committee on Judicial Elections, "that nine out of ten Ohioans believed that judicial decisions were affected by political contributions." Quote available at www.ajs.org/js/OH_elections.htm. All of the polls done nationwide regarding the public's beliefs on this topic have produced similar results. *See, e.g.*, Joy, *supra* note 2, at 672-75 (discussing public opinion of judges and judicial integrity).

[8] According to the American Bar Association, besides the United States, the only other countries in the world that elect their judges are Russia and Switzerland. Report of the ABA Task Force on Lawyers' Political Contributions, Part II, at 4 (May 1998), *quoted in* Report of the ABA Ad Hoc Committee on Judicial Campaign Finance (May 1999), available at www.abanet.org/cpr/adhoc599.html.

A summary of the ABA's activities in judicial ethics is available at www.abanet.org/judicialethics/about/background.html, and information on the ABA's current judicial ethics project, its Joint Commission to Evaluate the Model Code of Judicial Conduct, is available at www.abanet.org/judicialethics/home.html.

[9] This distortion cannot be cured by imposing spending limits on judicial campaigns, since those violate the First Amendment. *Suster v. Marshall*, 149 F.3d 523, 528-33 (6th Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999).

[10] Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STANFORD L. REV. 449 (1988).

1995,[11] and it was codified by the ABA in the Model Code of Judicial Conduct in 1999.[12] Petition for a Writ of Certiorari, at 23-24. In the last ten years, the courts of Alabama have not been paralyzed by this very simple rule, and no Alabama litigant has been unable to find a disinterested judge to hear his or her case. As a matter of substantive due process, this Court should incorporate this type of standard into the minimum substantive due process standards that state judicial systems must afford litigants in order to comply with their due process rights guaranteed by the Constitution.

CONCLUSION

In conclusion, and for the foregoing reasons, this Case is *not* moot, and this Supreme Court of the United States should GRANT the Petitioner, Mr. Jeffrey F. Jones, a writ of certiorari to review the Ohio Supreme Court's refusal to disqualify the Trial Court from presiding over his underlying and pending legal malpractice case against the Defendants.

Respectfully submitted,

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[11] ALA. CODE §§ 12-24-1 & -2 (West 2006). These statutes are reprinted in the Petition for a Writ of Certiorari, at App. 75.

[12] ABA MODEL CODE JUD. CONDUCT Canon 3(E)(1)(e) (1999); *see* ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 245-46 (2004) (discussing 1999 amendment that resulted in Canon 3(E)(1)(e)). This canon is reprinted in the Petition for a Writ of Certiorari, at 23.

IN THE COURT OF COMMON PLEAS

CASE NO. CV-518194

STATE OF OHIO)
) SS:
CUYAHOGA COUNTY)

JEFFREY F. JONES,)
Plaintiff)
)
vs.) **JUDGMENT ENTRY**
BAKER & HOSTETLER LLP, *et al.*,)
Defendants)

JANET R. BURNSIDE, JUDGE:

The undersigned voluntarily recuses herself from the above-captioned actions. While the Plaintiff's allegations of prejudice are baseless, Defendants are entitled to proceedings that are not likely to be interrupted by additional claims of prejudice. My voluntary recusal is not based upon any prejudice or bias possessed now or in the past; rather this Court recuses itself in the interest of judicial economy, saving the parties' valuable time and expense and allowing this action to come to a swift and just conclusion based on the parties' original dispute.

The above-captioned actions are transferred to the Hon. Nancy McDonnell, Administrative Judge, for re-assignment.

IT IS SO ORDERED.

/s/ Janet R. Burnside
JANET R. BURNSIDE, JUDGE

July 13, 2006

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JEFFREY F. JONES Plaintiff	Case No: CV-03-518194
BAKER & HOSTETLER LLP, ET AL Defendant	Judge: JANET R BURNSIDE **JOURNAL ENTRY**

95 DISP. TRANSIG – FINAL, 02 RE-ASSIGNED

CAPTIONED CASE BEING ORIGINALLY ASSIGNED TO JUDGE JANET R. BURNSIDE (302) AND FOR GOOD CAUSE SHOWN, THIS MATTER IS HEREBY REASSIGNED AND TRANSFERRED TO THE DOCKET OF JUDGE PETER J. CORRIGAN (344) FOR FURTHER PROCEEDINGS ACCORDING TO LAW

ADMINISTRATIVE JUDGE NANCY R. MCDONNELL

/s/ Nancy R. McDonnell 7-14-06
Judge Signature Date

(3) No. 06-53

FILED
SEP 19 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

MR. JEFFREY F. JONES,

Petitioner,

v.

THE HONORABLE JANET R. BURNSIDE, JUDGE,

and

THE HONORABLE THOMAS J. MOYER, CHIEF JUSTICE,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

SECOND SUPPLEMENTAL BRIEF

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SECOND SUPPLEMENTAL BRIEF

In his Petition for a Writ of Certiorari, the Petitioner, Mr. Jeffrey F. Jones, respectfully prayed for this Supreme Court of the United States to grant a writ of certiorari to review the Ohio Supreme Court's refusal to disqualify the Trial Court from presiding over his underlying and pending legal malpractice case against the Defendants. Petition for a Writ of Certiorari, at 1, 30.[1]

The Petitioner may keep this Court advised of new developments via supplemental briefs, which is why he has filed his Second Supplemental Brief. U.S. SUP. CT. R. 15(8).

REASONS FOR GRANTING THE PETITION

I. This Court's Judicial Free Speech Case of *Republican Party of Minnesota v. White* Has Created Havoc Nationwide in Regards to the Several States' Ability to Enforce their Codes of Judicial Conduct, and the Only Way to Correct this Imbalance Is to Make Clear that with Increased Judicial Speech Comes the Increased Duty for Recusal and Disqualification in Order to Protect Litigants' Due Process Rights as well as to Guard against Further Erosion of the Public's Lack of Confidence in the Judiciary (New Information) –

Since the Petitioner filed his Petition, nary a day has gone by that the continued fallout from *White* does not

---

[1] The Petition was filed July 10, 2006, it was received by the Clerk of this Court on July 12th, and it was docketed on July 13th. The Petition was served on the Respondents and Underlying Defendants by Federal Express, and it was delivered to all of them on July 11th. The Petitioner notified the Respondents and Underlying Defendants of the docketing of the same, on the forms provided by the Clerk's office, by United States First-Class Mail on July 17th (the same day he received the same from the Clerk's office). On July 24th, the Petitioner filed a Supplemental Brief in regards to why the Petition is *not* moot. On August 14th, the Chief Justice of the Ohio Supreme Court filed his Waiver of his Right to Respond to the Petition. To date, the Trial Court has made no filing herein.

appear in the press, and from a recent National Law Journal article summarizing those developments, it now appears that this fallout is directly related to the pro-life/anti-abortion activists' attack on judicial independence, presumably in payback for *Roe v. Wade* and its progeny, which is illuminating. Marcia Coyle, *Judicial Surveys Vex the Bench*, NAT'L L.J., Sept. 4, 2006, at 1;[2] *see also* Terry Carter, *Loaded Questionnaires?*, A.B.A. J. E-REPORT, Sept. 8, 2006 (Vol. 5, Issue 36) (reporting on the Florida questionnaire experience, with links to the Florida Family Planning Council's 2006 Statewide Judicial Candidate Questionnaire as well as to the National Center for State Courts National Ad Hoc Advisory Committee on Judicial Campaign Oversight's Advice Letter, dated Aug. 28, 2006).[3]

This Court should make no mistake about it: The *White* tsunami is sweeping this country, with federal courts lining up to declare any part of the plenary codes of judicial conduct unconstitutional under the First Amendment, when *White* was incorrectly decided under an unnecessary strict scrutiny analysis.[4] Judges are not politicians,[5] they cannot be lobbied, they cannot pledge themselves to a specific outcome, etc., and just like lawyers, they are entitled to no more than commercial free speech protection under the First Amendment.[6] *Cf.* Jeffrey

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[2] This article is reprinted *infra* App. 1.

[3] This second article is available at www.abanet.org/journal/ereport/s8canon.html, and it is reprinted *infra* App. 7.

[4] *See* Petition for a Writ of Certiorari, at 12-16; *see also* Background Paper of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct (discussing ABA activities in judicial ethics, activities in the states in response to *White*, and the current ABA project), available at www.abanet.org/judicialethics/about/background.html.

[5] *See* Jack Stith, *President's Perspective: Let's Talk the Right Talk About our Courts*, OHIO LAW., Sept.-Oct. 2006, at 1 ("84% of Americans polled feel we need strong courts that are free from political influence." (citation omitted)).

[6] In regards to lawyers:

> For 30 years, the courts have embraced the principle that legal advertising or solicitation is a form of commercial speech that is entitled to protection under the First Amendment.

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M. Shaman, *Judicial Ethics*, 2 GEO. J. LEGAL ETHICS 1, 1-3 (1988) (discussing unique role of a judge).

This Court cannot ignore the threat of financial contributions and political pressure to judicial independence, without which, there is no real separation of powers under our tripartite system of government. *See* Interview by Bill Moyers with Justices Kennedy & Breyer on *Frontline: Justice for Sale* (PBS television broadcast Nov. 23, 1999).[7] According to Justice Kennedy, "If an attorney gives money to a judge with the expectation that the judge will rule in his interest or his client's interest, that is corrosive of our institutions. That is corrosive of judicial independence." *Id.* According to Justice Breyer, "Judicial independence doesn't mean you decide the way you want. Independence means you decide according to the law and the facts . . . [which] do not include deciding according to campaign contributions." *Id.*; *see* ABA MODEL CODE OF JUD. CONDUCT Canon 3(E)(1)(e) (2003) (disqualification for campaign contributions);[8] *id.* at Canon 5(C)(2) Cmt.

. . .

> In *Florida Bar v. Went For It, Inc.*, [this Court] upheld [a] Florida State Bar Rule . . . , which [had] adopted a 30-day waiting period after an accident or injury before a lawyer is permitted to send an unsolicited written communication to the victim or his or her family. The rationale for upholding the rule was the "erosion of confidence in the profession that advertising of this kind engenders." [515 U.S. 618, 635 (1995).]

Gretchen M. Nelson, *Practicing Law Ethically in a Changing Technological World*, THE BRIEF 32, 33-36 (Spring 2006) (footnotes omitted) (overview of lawyer advertising in the context of direct mail solicitations, web sites, e-mail versus chat rooms, and interstate advertising).

[7] The complete television transcript is available at www.pbs.org/wgbh/pages/frontline/shows/justice/etc/script.html; the transcript of just the interview with Justices Kennedy & Breyer is available at www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html, which is reprinted *infra* App. 20; and a video of the Justices' interview is available at http://media.pbs.org/ramgen/wgbh/pages/frontline/1807/justices.rm.

[8] *See* Petition for a Writ of Certiorari, at 23.

(same);[9] *cf.* Ohio State Bar Association E-Mail to Members, Dated Aug. 2, 2006 (noting that a majority of Ohioans believe contributions affect judicial decisions).[10]

As admitted to above, the attorney for the pro-life/ anti-abortion activists, James Bopp, Jr., "also believes recusal and solicitation clauses are vulnerable to First Amendment attack and he is waging those attacks in the Kansas lawsuit." Coyle, *supra*. If this Court allows *White* to

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[9] This commentary states in part as follows:

> There is legitimate concern about a judge's impartiality when parties whose interests may come before a judge, or the lawyers who represent such parties, are known to have made contributions to the election campaigns of judicial candidates. This is among the reasons that merit selection of judges is a preferable manner in which to select the judiciary. Notwithstanding that preference, Section 5C(2) recognizes that in many jurisdictions judicial candidates must raise funds to support their candidacies for election to judicial office. It therefore permits a candidate, other than a candidate for appointment, to establish campaign committees to solicit and accept public support and reasonable financial contributions. In order to guard against the possibility that conflicts of interest will arise, the candidate must instruct his or her campaign committees at the start of the campaign to solicit or accept only contributions that are reasonable and appropriate under the circumstances. Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge may, by virtue of their size or source, raise questions about a judge's impartiality and be cause for disqualification as provided under Section 3E.

ABA MODEL CODE OF JUD. CONDUCT Canon 5(C)(2) Cmt. (2003) (this language was adopted by the ABA in 1997).

[10] In Ohio:

> [O]ver 80% of our citizens believe that financial contributions (money) influence judicial decision-making. Even more alarming are national polls showing that over 30% of judges share this opinion. The result is a serious erosion of public trust and confidence in the judiciary that causes our citizens to question whether their courts can be fair and impartial.

Ohio State Bar Association E-Mail to Members, Dated Aug. 2, 2006 (reprinted *infra* App. 13).

remain the law of the land, then the substantive due process right to a fair and impartial judge must be enforced through a standardized recusal and disqualification procedure. These are two sides of the same coin of judicial independence.[11] *See* Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 572-604 (2004) (discussing disqualification for campaign statements); *see also* ABA MODEL CODE OF JUD. CONDUCT Canon 3(E)(1)(f) (2003).[12]

The Conference of Chief Justices is very aware of the *White* tsunami, on August 2, 2006, they adopted a Resolution to deal with it,[13] and currently they are "launching a

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[11] For instance, in *North Dakota Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021 (D.N.D. 2005), an organization that publishes information about judicial candidates and their views challenged several provisions of North Dakota's canons after several candidates had refused to answer questions on questionnaires the organization circulated. The federal district court held that the state's Pledges or Promises and Commit Clauses violated the First Amendment, because they forbid the same types of speech as the Announce Clause struck down in *White*. *Id.* at 1037-42. However, the court upheld the state's recusal rules, finding that they are narrowly tailored to serve the compelling state interest in judicial impartiality. *Id.* at 1043-44.

[12] This section states:

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: the judge, while a judge or a candidate* for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to (i) an issue in the proceeding; or (ii) the controversy in the proceeding.

ABA MODEL CODE OF JUD. CONDUCT Canon 3(E)(1)(f) (2003) (asterisk indicates a defined term) (this section was adopted by the ABA in 2003).

[13] Conference of Chief Justices, Policy Statements & Resolutions, Resolution 7 in Support of Action to Improve Judicial Selection and Improve Public Confidence in the Judiciary (Aug. 2, 2006), available at http://ccj.ncsc.dni.us/JudicialSelectionResolutions/resol7JudicialSelection.html, reprinted *infra* App. 15.

The Conference of Chief Justices ("CCJ") held a National Summit on Improving Judicial Selection in December of 2000, the summit materials are published in 35:4 LOYOLA L.A. L. REV. 1353 (June 2001)

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(they are also available at http://llr.lls.edu/volumes/v34-issue4/index.html), and the summit report is available at www.ncsconline.org/D_Research/CallToActionCommentary.pdf. The resulting "Call to Action, Statement of the National Summit on Improving Judicial Selection," was submitted in January of 2001, and it is published at 34:4 LOYOLA L.A. L. REV. 1353 (June 2001) (it is also available at www.ncsconline.org/WC/Publications/Res_JudSel_CallToActionPub.pdf).

The CCJ next held a National Symposium on Judicial Campaign Conduct and the First Amendment in November of 2001, and the symposium materials are published in 35:3 INDIANA L. REV. 649 (2002) (they are also available at www.in.gov/judiciary/supreme/docs/).

Most recently, the CCJ held a National Symposium on Judicial Speech, Post-*White*, in February of 2005, but the materials remain unpublished. The resulting "Call to Action, 2005," was submitted in July of 2005, but it also remains unpublished.

The 2001 Call to Action Item 19 recommended that "[s]tates should consider adoption of the 1999 amendments to the ABA Model Code of Judicial Conduct respecting judicial campaign finance, as appropriate in each jurisdiction." 34:4 LOYOLA L.A. L. REV. at 1358. The 2005 Call to Action Item 1 "urge[d] the CCJ to consider action on the December 2000 Summit's Call to Action," and Item 4 "urge[d] the CCJ to consider acting upon the 20 Recommendations adopted after the December 2000 Summit." Unpublished, at 1, 7. In regards to 2001 Call to Action Item 19, the 2005 Call to Action noted that "[o]nly Mississippi has adopted the [1999] amendments [to the ABA Model Code of Judicial Conduct]. The only other [s]tate in which adoption was even considered was Texas. The problems that surround judicial campaign finance are well known, and the challenge warrants action in all [s]tates which have judicial elections of any type." *Id.* at 13-14.

This is a departure from the CCJ's original opposition to the 1999 amendments. Specifically:

> In the [CCJ's] response to the ABA Task Force Report [that lead to the 1999 amendments], the Chief Justices stated that they supported recusal of judges in "jurisdictions where judicial candidates have knowledge of the identity of campaign contributors and the amounts of their contributions, and only to the extent that it applies to lawyers or parties who donate more to a judicial campaign than the amount permitted by law, whether established by statute or court rule."

Peter A. Joy, *A Professionalism Creed for Judges: Leading by Example*, 52 S.C. L. REV. 667, 694 (2000-2001) (footnote omitted).

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campaign to remind voters of what used to be obvious: Judicial elections are different from those for other offices." Tony Mauro, *Chief Justices Sound Alarm on Judicial Elections*, LEGAL TIMES, Aug. 21, 2006.[14]

At the risk of being cynical, the elected Chief Justices are incumbents, incumbents have an easier time of raising money for their reelections, because they are usually reelected, statistically, and therefore, they have little incentive to curtail campaign contributions. *E.g.*, Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13, 26-41 (2003); *see also* Nancy Marion, Rick Farmer & Todd Moore, *Financing Ohio Supreme Court Elections 1992–2002: Campaign Finance and Judicial Selection*, 38 AKRON L. REV. 567, 576–77 (2005) (discussing positive effect of incumbency in Ohio Supreme Court elections).

In Ohio, there is a reason that people give to incumbents. For example, two-thirds of the Ohio Supreme Court's rulings from 1993–1998 favored major campaign contributors. T.C. Brown, CLEVELAND PLAIN DEALER, Feb. 15, 2000, at 1-A. The amount of money spent at the Ohio Supreme Court level is so great, that, according to the Chief Justice of the Ohio Supreme Court, "[i]t's not uncommon for [him] to vote on a case in which both lawyers have contributed [to him]. . . ." *Id.* This is an about face from when he was first elected in 1986 – in a campaign that cost $2.7 million versus 1980's election cost of $99,192 – and where after, he chose to recuse himself from cases involving major campaign contributors – but only after he was called out by the press. Sheila Kaplan, *Justice for Sale*, COMMON CAUSE 29, 30–31 (May/June 1987).

And at the risk of being really cynical, the biggest risk to incumbents is the *White* tsunami, which allows opponents to campaign on political issues, where before, judicial opponents had little they could say, and this explains why the CCJ has now decided to get out from behind, and jump in front of, this ongoing destruction of judicial independence. *See, e.g.*, James Layman, Note, *Judicial Campaign Speech Regulation: Integrity or Incentives?*, 19 GEO. J. LEGAL ETHICS 769, 769 (2006) ("[T]he effects of restrictions on judicial speech significantly favor incumbents over challengers. . . . "). Had the CCJ not opposed the ABA's 1999 amendments, and had they not ignored these same amendments for the past seven years, possibly, this storm may not have arisen in the first place.

[14] This article is available at www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1156164646626, and it is reprinted *infra* App. 17.

III. The Failure of the State of Ohio (and All Thirty-Eight Other States that Elect their Judges) to Adopt ABA Model Code of Judicial Conduct Canon 3(E)(1)(e) (1999), Which Provides for Disqualification and Recusal Related to Campaign Contributions by Parties and their Lawyers Over a Certain Threshold, or Its Failure to Adopt Any Other Like Standard, Violates the Petitioner's Fourteenth Amendment Substantive Due Process Right to a Fair and Impartial Trial Judge and Chief Justice (Clarification) –

The Petitioner was slightly incorrect: One state, Mississippi, has adopted something similar to the ABA's 1999 amendments,[15] even though Mississippi maintains that its provision is different than the ABA's, to wit: "Recusal of Judges from Lawsuits Involving Major Donors.

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[15] In 1999, the ABA amended Canon 3(C), adopting subsection 5; it amended Canon 3(E)(1), adopting subsection e; and it amended Canon 5(C)(3 & 4). *See* 1999 ABA Annual Meeting Report to the House of Delegates 123 (Report of the ABA Ad Hoc Committee on Judicial Campaign Finance (May 1999), available at www.abanet.org/cpr/adhoc599.html). In 1997, the ABA had amended the comment to Canon 5(C)(2). *See* 1997 ABA Annual Meeting Report to the House of Delegates 112 (unreported). All of these amendments related to the negative influence of campaign contributions on judicial independence. *See* ABA MODEL CODE OF JUD. CONDUCT App. B (2004) (cataloguing amendments to the 1990 Code to date).

In 2003, in response to *White*, the ABA amended the Terminology section, adding a definition for "impartiality"; it amended Canon 1's Commentary; it amended Canon 2's Commentary; it amended Canon 3(B) as well as its Commentary, and it added Canon 3(E)(1)(f); and it amended Canon 5(A)(3). *See* 2003 ABA Annual Meeting Report to the House of Delegates 105B, available at www.abanet.org/leadership/2003/journal/105b.pdf. However, it is hardly clear that these amendments will survive strict scrutiny analysis under *White*. *See* Matthew J. Medina, Note, *The Constitutionality of the 2003 Revisions to Canon 3(E) of the Model Code of Judicial Conduct*, 104 COLUM. L. REV. 1072, 1095-1107 (2004) (noting that the ABA's concurrent attempt to relax judicial speech restrictions but increase judicial disqualification for that speech may not pass strict scrutiny analysis).

A party may file a motion to recuse a judge based on the fact that an opposing party or counsel of record for that party is a major donor to the election campaign of such judge. Such motions will be filed, considered and subject to appellate review as provided for other motions for recusal." MISS. CODE JUD. CONDUCT Canon 3(E)(2).[16]

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[16] The Commentary to this Section states as follows:

> Section 3(E)(2) recognizes that political donations may but do not necessarily raise concerns about a judge's impartiality. The filing, consideration and appellate review of motions for recusal based on such donations are subject to rules governing all recusal motions. For procedures concerning motions for recusal and review by the Supreme Court of denial of motions for recusal as to trial court judges, see M.R.C.P. 16A, URCCC 1.15, Unif. Chanc. R. 1.11, and M.R.A.P. 48B. For procedures concerning motions for recusal of judges of the Court of Appeals or Supreme Court justices, see M.R.A.P. 27(a). This provision does not appear in the ABA Model Code of Judicial Conduct; however, see Section 3(E)(1)(e) of the ABA model.

MISS. CODE JUD. CONDUCT Canon 3(E)(2) (Commentary) (citations corrected).

> "Major donor," for the purposes of Section 3(E)(2), shall be defined as follows:
>
> (a) If the donor is an individual, "donor" means that individual, the individual's spouse, or the individual's or the individual's spouse's child, mother, father, grandmother, grandfather, grandchild, employee and employee's spouse.
>
> (b) If the donor is an entity other than an individual, "donor" means the entity, its employees, officers, directors, shareholders, partners[,] members, and contributors and the spouse of any of them.
>
> (c) A "major donor" is a donor who or which has, in the judge's most recent election campaign, made a contribution to the judge's campaign of (a) more than $2,000 if the judge is a justice of the Supreme Court or judge of the Court of Appeals, or (b) more than $1,000 if the judge is a judge of a court other than the Supreme Court or the Court of Appeals.
>
> (d) The term "contribution to the judge's campaign" shall be the total of all contributions to a judge's campaign and shall be deemed to include all contributions of every kind and type whatsoever, whether in the form of cash, goods, services, or other form of contribution, and whether

(Continued on following page)

CONCLUSION

In conclusion, and for the foregoing reasons, this Supreme Court of the United States should GRANT the Petitioner, Mr. Jeffrey F. Jones, a writ of certiorari to review the Ohio Supreme Court's refusal to disqualify the Trial Court from presiding over his underlying and pending legal malpractice case against the Defendants.

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donated directly to the judge's campaign or donated to any other person or entity for the purpose of supporting the judge's campaign and/or opposing the campaign of the judge's opponent(s). The term "contribution to a judge's campaign" shall also be deemed to include any publication, advertisement or other release of information, or payment therefore, other than a bona fide news item published by existing news media, which contains favorable information about the judge or which contains unfavorable information about the judge's opponent(s).

In defining "members of the candidate's family" and "members of the judge's family" siblings of the candidate and judge are included. The phrase "major donor" is also included. Likewise, no reference is made to retention elections. In these respects, this section differs from the ABA Model Code of Judicial Conduct.

MISS. CODE JUD. CONDUCT (Terminology & Commentary) (citation and grammar corrected).

For a discussion of the history of these amendments, *see* Miss. Admin. Office of Courts, *Supreme Court Adopts Code of Judicial Conduct and Revises Rule of Attorney Discipline* (Apr. 4, 2002), available at www.mssc.state.ms.us/news/04.04.02codex.htm.

Marcia Coyle, *Judicial Surveys Vex the Bench*
NAT'L L.J., Sept. 4, 2006, at 1

When Tennessee Court of Criminal Appeals Judge John Everett Williams, who was up for retention election this year, got his questionnaire from the Tennessee Family Action Council soliciting his views on abortion, the death penalty, same-sex marriage, evolution and other issues, he declined to respond, citing Chief Justice John G. Roberts Jr. as setting "the gold standard" on ethical conduct during his U.S. Supreme Court confirmation hearings.

"As did Justice Roberts, I do not wish to hint or signal that I am predisposed to rule on any matter that may come before me as a judge," wrote Williams in June, one of 64 Tennessee judges receiving the questionnaire.

Questionnaires for judicial candidates have been an "issue" since at least 2000, according to court and election officials, because they raise concerns about sitting judges and judicial candidates campaigning and making promises just as other political candidates do.

But this year, the questionnaires are proliferating, more sophisticated and seemingly coordinated across states.

"My impression is there are more questionnaires and most are coming from what would be considered religious right groups and they are being vetted by the same folks working with each other," said Cynthia Gray, director of the Center for Judicial Ethics at the American Judicature Society. "I'm not suggesting that's a bad thing."

She said that there is probably a "reluctant consensus" that judicial candidates have a First Amendment right to respond to these questions. "However, there are also a lot of people, including incumbent judges and

judicial candidates, who don't necessarily think it's a good idea."

Concerns about the questionnaires have reached the National Center for State Courts whose National Ad Hoc Advisory Committee on Judicial Campaign Oversight is preparing to send a letter to state courts, state bar associations and others with recommendations on how to deal with them.

Noting there is "no simple right answer" on how to respond, the advisory committee makes five recommendations:

- Don't be rushed into deciding how to handle the questionnaire: The committee says questionnaires often come just a few days before the "due" date for response.
- Never use the preprinted answers on the questionnaire: Simplifying a legal or political issue to a yes/no answer is "inconsistent" with a judge's role, and there's no legal obligation to discuss any issue, according to the committee.
- Consider responding with a letter that educates voters on the role of judges.
- Distinguish general interest, nonadvocacy groups from special interest advocacy groups and be consistent in dealing with their questionnaires.
- And never use a judicial canon of ethics to justify a decision not to respond.

That last recommendation is necessary because the result of citing a judicial canon as the reason for no response is a lawsuit, said committee member Roy Schotland of Georgetown University Law Center.

Schotland noted that questionnaires sent to judicial candidates in Tennessee, Kansas and Georgia contain

almost identical footnotes to the "decline to respond" option.

The footnote states that that particular response indicates that the candidate would answer the question but for canons of conduct prohibiting pledges and promises, or statements that commit the candidate to positions on issues that may come before the court.

If a judicial candidate does cite those canons, it's a "pretty fair bet" the state and/or its judicial ethics commission will be sued, agreed Gray. Within weeks of issuing an advisory opinion counseling against answering questionnaires, Gray said, Kansas was sued. And there have been similar suits against Indiana, Alaska, Kentucky, Pennsylvania, Florida and North Dakota, she said.

Gunning for canons

The lawyer behind most of those suits is James Bopp Jr. of Bopp, Coleson & Bostrom of Terre Haute, Ind., general counsel to the National Right to Life Committee and the victorious attorney in *Republican Party of Minnesota v. White*, 536 U.S. 762 (2002).

In *White*, the U.S. Supreme Court held that the so-called "announce clause" of the Minnesota judicial code, which prohibited judicial candidates from stating their views on legal issues within the province of the court for which they were running, violated the First Amendment.

Bopp confirms that he and his clients, relying on *White*, have been filing suits based on judges' responses that they can't answer the questionnaires because of judicial canons. And they have been remarkably successful.

"We've challenged a number of canons," he said, including those prohibiting judges from making campaign pledges and promises, and those prohibiting judges from committing themselves to certain positions once they are on the bench.

"The regulators and/or the courts in interpreting these clauses were prohibiting judges from announcing their views. My view is that's just cut and dry. The Supreme Court said you can announce your views and they can't prohibit it through some other clause."

Bopp also believes recusal and solicitation clauses are vulnerable to First Amendment attack and he is waging those attacks in the Kansas lawsuit.

A federal trial judge recently issued a temporary injunction in the Kansas suit after finding that the plaintiffs are substantially likely to succeed on the merits of their claim that the pledge and promise and commit clauses unconstitutionally chill a substantial amount of protected speech.

The court also found that that plaintiffs are substantially likely to show that the clause barring solicitation of campaign funds is underinclusive and fails to address problems of partiality that are inherent in a system of judicial elections. However, the court rejected the plaintiffs' challenge to the recusal canon.

Recusal should not be required, said Bopp, where a judge has expressed a view on an issue but says he or she can keep an open mind. And solicitation clauses should not be used to bar a judicial candidate from seeking signatures on a nomination petition, he added.

Foot in door

On the opposite side of Bopp in the Kansas and Indiana lawsuits is George T. Patton Jr. of the Washington office of Indianapolis' Bose, McKinney & Evans.

The Kansas case is now pending appeal of the injunction in the 10th U.S. Circuit Court of Appeals. *Kansas Judicial Watch v. Stout*, No. 06-3290.

In Pennsylvania, a federal district judge dismissed the challenge to the pledge and promise and commit clauses after finding that the plaintiffs had no standing. That case is pending appeal in the 3d Circuit. *Pennsylvania Family Institute v. Black*, No. 05-5259.

And a suit in which Bopp successfully challenged those clauses in the Alaskan code of judicial conduct is pending appeal in the 9th Circuit. *Alaska Right to Life PAC v. Feldman*, Nos. 05-35902, 05-36027.

Patton noted that challenges to those clauses succeeded in Kentucky, which settled the lawsuit after the 6th Circuit denied its appeal of the injunction in that case, and in North Dakota, which decided not to appeal.

In the Indiana case, Patton said, he is awaiting a ruling on his motion to dismiss for lack of standing. The plaintiffs are Indiana Right to Life and an individual who is not a judge or judicial candidate.

Patton said that he spoke to all of the judges who received a questionnaire and they said that despite their First Amendment right to speak on those issues, they chose not to answer. Indiana Right to Life then asked to depose the judges. The trial judge denied his motion for a protective order.

"This is what judges need to know – the goal is to get them under oath and to ask: Did you contact the ethics

commission and did the commission tell you not to answer? If there were no canons, would you answer?" said Patton. "They are trying to take a right and make an obligation out of it."

In 2002, the Supreme Court in its *White* decision could not have envisioned fallout from its ruling such as judges being deposed, detailed questionnaires being sent by special interest groups and the breadth of the pending legal challenges, said Patton.

"In the *White* opinion, Justice [Antonin] Scalia makes very clear the distinction between the announce clause and the pledge and promise and commit clauses," he said. "It shows that once you get a foot in the door, you try to crack the door more widely open."

And Bopp apparently has a large foot. Next on his list, he said, are First Amendment challenges to state rules prohibiting judicial candidates in nonpartisan competitive and retention elections from identifying their political party preference.

"It's a real good shorthand for giving your general philosophy," said Bopp, who recently filed such a lawsuit in Kentucky. "I think stating your party preference is indistinguishable from announcing your views."

Terry Carter, *Loaded Questionnaires?*
A.B.A. J. E-REPORT, Sept. 8, 2006 (Vol. 5, Issue 36).[16]

Three Florida Supreme Court justices who are up for retention election this fall recently received a Christian group's questionnaire on issues important to that group, including opposition to abortion and same-sex marriage.

The judges, through the court spokesman in a letter dated Aug. 22, declined to answer, noting that doing so "could be interpreted as a position on an issue that may come before the judge."

Then came the lawsuit, filed in federal court six days later by the Florida Family Policy Council. It claims sections of the state Code of Judicial Conduct are unconstitutional insofar as they are being used to prohibit judicial candidates from expressing their views on important issues. *Florida Family Policy Council v. Freeman*, No. 4:06CR395 (N.D. Fla.).

Critics on both sides of the increasingly hot issue of questionnaires posed to judicial candidates say Florida fell into a trap that has already ensnared other states in litigation brought by similar interest groups. And the interest groups have been winning more than their share of the cases.

The response from the Florida justices came shortly after the Judicial Ethics Advisory Committee, an arm of

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[16] This article is available at www.abanet.org/journal/ereport/s8canon.html, and it includes links to the Florida Family Planning Council's 2006 Statewide Judicial Candidate Questionnaire as well as to the National Center for State Courts National Ad Hoc Advisory Committee on Judicial Campaign Oversight's Advice Letter, dated Aug. 28, 2006.

the state supreme court, issued an opinion. "Candidates are not per se barred from responding to questionnaires which deal with disputed legal and political issues," the committee wrote, but "must not furnish answers that appear to bind the candidate if such issues arise once the candidate has assumed judicial office." Opinion No. 2006-18 (Aug. 7).

The opinion went on to state that "the dispositive question is still whether the individual 'beholder's' fear of partiality is reasonable, reasonableness being determined by a neutral and objective standard."

"That opinion could have been done a lot better," says Roy A. Schotland, a professor at the Georgetown University Law Center and a longtime observer of judicial elections. "And though it doesn't seem intended, it invited this lawsuit."

The evolving cat-and-mouse game with judicial election questionnaires has gotten faster and finer as it moves into the corners – most significantly since the 2000 elections. Many questionnaires now ask candidates who decline to answer to check blocks indicating why, and one choice concerns the possibility of violating ethical canons. The battle is primarily between concern for the appearance of impartiality in the judiciary and a competing concern for voters to be able to make meaningful choices among judicial candidates.

James Bopp Jr., a Terre Haute, Ind., lawyer who vets questionnaires for a number of interest groups, says he expects judges to be impartial and rule solely according to the law. But, he says, judicial candidates should be permitted to express their views on various issues.

Critics counter that such questioning is an attempt to determine how a judge or would-be judge would rule in certain matters, and would undermine public confidence in the judiciary.

The mostly conservative, mostly Christian-based interest groups pressing the questionnaires are forcing state judiciaries to deal with the ramifications of the U.S. Supreme Court's ruling in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). It held that the "announce clause" in Minnesota's judicial canons, which prohibited judicial candidates from announcing their views on disputed legal or political issues, violated their First Amendment rights.

The ABA House of Delegates in 2003 amended the Model Code of Judicial Conduct to comply with *White*, removing the so-called announce clause at the heart of that ruling. At the same time, the ABA launched a commission to work on the first sweeping revisions of the canons since 1990.

In the interim, the temporary fix in 2003 has not stopped repeated litigation over the impact of the canons on judicial elections. The commission's final draft report, which will go to the ABA House of Delegates at the mid-year meeting, is expected to be released in about two weeks.

The Supreme Court in *White* did not rule on a clause in some judicial canons that bars judicial candidates from making statements that commit or appear to commit them with respect to controversies that may come to the courts. Nor did the high court rule on a prohibition against "pledges or promises of conduct in office other than the

faithful and impartial performance of the duties of the office."

But some courts have taken the *White* opinion further to say those provisions also violate First Amendment rights, such as in a North Dakota case, *North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d. 1021 (2005). Bopp, the lawyer behind *Minnesota v. White* [sic.], has helped carry the fight over judicial campaign statements into several state lawsuits.

Hoping to keep judicial elections on the high road, the National Center for State Courts recently sent an advisory memorandum to state chief justices on how they might deal with the proliferation of questionnaires.

The memorandum, dated the same day Bopp filed suit in Florida but in the works for two years, offered five guidelines. Perhaps the most important one says: "Never use a judicial canon to justify a decision not to respond. Since *White*, interest groups have successfully litigated (in four states, with two more pending) to strike down canons that are read as prohibiting responses to their questionnaire, with recovery of costs and fees from the states."

"Sometimes when the Supreme Court rules, people accept the ruling and move on, and sometimes they have to be dragged kicking and screaming," says Ronald A. Rotunda, a professor at the George Mason School of Law. He has written extensively on professional responsibility and judicial ethics. "You can't take the politics out of politics, and once you decide you're going to have political elections for judges, this isn't excess baggage. It goes with territory."

The most recent kicks and screams, before Florida, came in Kansas. A federal judge in July ruled that, under *White*, opinions by the state's ethics advisory panel have led to unconstitutional prohibitions on campaign speech by candidates for the bench. The July 19 ruling is on appeal. *Kansas Judicial Watch v. Stout*, No. 06-4056-JAR (D. Kan.).

Bopp, who also handled the Kansas matter, says that case and others indicate that "what's really going on here is candidates are afraid to answer the questionnaires because of the canons. I'm shocked that the National Center for State Courts, whose purported mission is to help maintain the integrity of the judiciary, is telling them to lie about it and say that's not the reason."

Not so, says Schotland, who is a member of the NCSC's National Ad Hoc Advisory Committee on Judicial Campaign Oversight, which sent the advisory memorandum to state chief justices.

"Bopp is in denial that judges and candidates are lawyers who are professionals and have views of the role of a judge that differ from his, and the rule of law depends on their protecting that view," Schotland says.

The NCSC advice on how candidates should respond to questionnaires states: "There is no simple right answer on how to respond. This is true because of variations in local circumstances and candidates' own preferences. Judicial candidates should research the law in their jurisdiction, consult with local judicial campaign committees, and definitely confer with other candidates."

In the rest of its memorandum, the NCSC advises that judges should not be rushed to respond; not use

preprinted answers supplied on the questionnaire, but instead respond by letter; and distinguish "general-interest, non-advocacy groups from special interest advocacy groups," yet be consistent in all responses.

Ohio State Bar Association E-Mail to Members,
Dated Aug. 2, 2006

From: bounce-announcement2-2315930@lists.ohiobar.org [mailto:bounce-announcement2-2315930@lists.ohiobar.org] On Behalf Of osba@ohiobar.org
Sent: Wednesday, August 02, 2006 1:17 PM
To: announcement2@lists.ohiobar.org
Subject: OSBA "Appointive Elective" System Survey

Dear Member of the Ohio State Bar Association:

Our most recent elections for the Ohio Supreme Court, like those in several other states, have involved the expenditure of millions of dollars, more often than not from independent third-party committees. For several years, Ohio was regarded as the "poster child" for much that is wrong in judicial elections, primarily the influence of money in the selection of judges for our highest court. Polls and surveys in Ohio note that over 80% of our citizens believe that financial contributions (money) influence judicial decision-making. Even more alarming are national polls showing that over 30% of judges share this opinion. The result is a serious erosion of public trust and confidence in the judiciary that causes our citizens to question whether their courts can be fair and impartial.

One idea that has been strongly advanced over the past several decades is an "appointive-elective" system for selection of Justices of the Ohio Supreme Court. An "appointive-elective" system provides for appointment of judges by the Governor from a list of recommended candidates compiled by a bipartisan nominating commission comprised of lawyers and non-lawyers. Such a commission can be constituted in a variety of ways, with appointments

by the Governor alone or through designated appointing authorities, including elected office-holders, bar associations and citizen groups. The objective is to have a diverse group of citizens reviewing the background, experience and qualifications of an expanded pool of applicants. After his or her initial appointment, a judge would periodically appear on the ballot to face the electorate in a retention election, thus being ultimately accountable to the public.

The subject of judicial selection has been a controversial issue in Ohio for many years. The Ohio State Bar Association has traditionally been involved in this issue in a variety of ways. Your OSBA Board of Governors is interested in your thoughts on this subject and, in order to gauge the current sense of our members, we respectfully ask you to take a moment and fill out the following survey.

Click here to take the survey: http://www.zoomerang.com/survey.zgi?p=WEB225JHGDEK2Z

Thank you for your assistance.

John S. Stith, OSBA President
&
Robert F. Ware, OSBA President-Elect

Conference of Chief Justices,
Policy Statements & Resolutions, Resolution 7
in Support of Action to Improve Judicial Selection
and Improve Public Confidence in the Judiciary
(adopted as proposed by the CCJ Task Force
on Politics and Judicial Elections at the
58th Annual Meeting on Aug. 2, 2006)[17]

WHEREAS, the Conference of Chief Justices co-sponsored a National Symposium on Judicial Speech Post-*White*, held in February 2005 and attended by justices, judges and others from 38 states; and WHEREAS, the Symposium participants prepared a *Call To Action/2005* to reflect developments since the Summit on Improving Judicial Selection issued its *Call To Action* in December, 2000, and to urge the Conference of Chief Justices to take the following steps:

- To issue a public declaration regarding the unique nature of judicial elections;
- To make recommendations on three key steps to protect and promote public confidence in the courts:
    1. Develop programs of outreach by judges and lawyers to help the public understand what judges do and particularly how their jobs differ from the jobs of other elected officials;
    2. Enhance efforts that seek to promote a culture of judicial elections so that the public and candidates understand the importance of having judicial elections

[17] This resolution is available at http://ccj.ncsc.dni.us/JudicialSelectionResolutions/resol7JudicialSelection.html.

conducted in ways that protect the reality and appearance of open-mindedness and fairness;

3. Identify measures that will attract and retain on the bench people who will be quality judges, including encouraging states to establish special commissions to review judges' pay and make changes if warranted.

- To review and take action on the 20 recommendations put forward in the original *Call To Action*, adjusted to respond to events since 2000;

NOW, THEREFORE, BE IT RESOLVED, that the Conference assigns the CCJ Task Force on Politics and Judicial Elections the responsibility of drafting an action plan to implement the above steps.

Tony Mauro, *Chief Justices Sound Alarm on Judicial Elections*
LEGAL TIMES, Aug. 21, 2006[18]

The nation's state chief justices are launching a campaign to remind voters of what used to be obvious: Judicial elections are different from those for other offices.

Voicing "grave concern" over increasingly partisan and costly campaigns, the Conference of Chief Justices – representing the top jurists in all 50 states, the District of Columbia, and U.S. territories – voted Aug. 2 on measures to emphasize the "unique nature" of judicial elections. At least some of the judges in 39 states are elected.

"It's the money, it's the judicial questionnaires, it's a whole constellation of things happening now that don't advance the public's confidence in the courts," says Indiana Supreme Court Chief Justice Randall Shepard, outgoing chairman of the conference, who hosted the chief justices' meeting in Indianapolis. "We need to get information to bar associations and judges groups about what to do when the fire alarm goes off, or before the alarm goes off, in an election."

The chief justices also targeted low judicial salaries, which may be discouraging quality candidates from running. New data indicate that state judges' salary increases are lagging behind those of other state employees as well as private sector lawyers.

Though concern has been building for years about the increase in campaign spending and partisanship in what

[18] This article is available at www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1156164646626.

used to be sedate judicial campaigns, the main impetus for the latest effort by the chief justices is the fallout from a 2002 U.S. Supreme Court decision, *Republican Party of Minnesota v. White*.

That ruling struck down, on First Amendment grounds, a Minnesota canon of judicial ethics that barred candidates from announcing their views on disputed legal or political issues.

Several lower federal courts have responded to the decision by striking down other state canons and rules aimed at keeping judicial candidates from making campaign promises and partisan statements that may compromise the substance and appearance of impartiality once they are elected.

On July 19, for example, Kansas Federal District Judge Julie Robinson cited the *White* ruling when she enjoined enforcement of that state's canon barring candidates from making promises about positions they will take on the bench. A judicial-watch organization sued after a state agency said judicial candidates should not respond to the group's questionnaire about issues including same-sex marriage and abortion rights.

"Most of the rulings so far run out ahead of the Supreme Court's decision, by and large in ways that lead to behavior that is not good for the judicial system," says Shepard, who fears the weakening of judicial canons will only feed the cynical view that judges are like candidates for other offices who can be pressured by interest groups and big donors. "No good comes from fostering judicial food fights at the ballot box."

The *White* de[illegible]ion's main effect has been to encourage interest grou[illegible] ply judicial candidates with questionnaires demanding that they take positions on controversial issues, says Georgetown University Law Center professor Roy Schotland, who studies judicial elections and worked with the chief justices on the issue. "The situation is bad, getting worse, with federal judges leading the way downhill."

At a symposium on the impact of the *White* decision at the National Judicial College in Reno, Nev., last year, participants called on the chief justices to move aggressively to improve public understanding of courts and the need for open-minded judges, as well as to change the "culture" of judicial elections.

A "call to action" endorsed by the participants at the Reno conference urged, "Very high priority must be given to reducing the aspects of judicial elections that jeopardize public confidence in our courts – our state courts directly, but unquestionably all our courts."

Interview by Bill Moyers with Justices Kennedy & Breyer on *Frontline: Justice for Sale* (PBS television broadcast Nov. 23, 1999).[19]

Bill Moyers: Last year in Philadelphia, at the American Bar Association, both of you were quite outspoken on this issue of judicial independence and the threat of financial contributions and political pressure. Why did you sound the alarm?

Justice Kennedy: We have a special point of view to present. The judiciary as an institution is faced with a new threat. Democracy is something that you must learn each generation. It has to be taught. And we must have a national civics lesson about judicial independence.

Justice Breyer: It's important to every American that the law protect his or her basic liberty. We developed a system of protecting human liberty such that judges and independent judges are a necessary part of that protection. I think it's important that Americans understand that. And if that independence is seriously eroded, it will be hard to protect those things that this country was based upon.

Bill Moyers: You said in Philadelphia, Justice Kennedy, that the law makes a promise. The promise is neutrality. What do you mean by neutrality?

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[19] The complete television transcript is available at www.pbs.org/wgbh/pages/frontline/shows/justice/etc/script.html; the transcript of just the interview with Justices Kennedy & Breyer is available at www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html; and a video of the Justices' interview is available at http://media.pbs.org/ramgen/wgbh/pages/frontline/1807/justices.rm.

Justice Kennedy: You have to remember that we live in a constitutional democracy, not a democracy where the voice of the people each week, each year, has complete effect. We have certain constitutional principles that extend over time. Judges must be neutral in order to protect those principles . . . There's a rule of law, [and it] three parts. One: the government is bound by the law. Two: all people are treated equally. And three: there are certain enduring human rights that must be protected. There must be both the perception and the reality that in defending these values, the judge is not affected by improper influences or improper restraints. That's neutrality.

Bill Moyers: And yet, as you said in Philadelphia, judges don't emerge in a vacuum. You all are products in a way of the political process – not individually, but it's the process that gets you to where you are, even if appointed. Is neutrality really possible?

Justice Breyer: I think, Yes, it is. Judges are appointed often through the political process. At least there's a political input, but when you put on the robe, at that point the politics is over. And, at that point, a judge must think through each case with the total neutrality that you mentioned . . . All anyone has to ask himself is, Suppose I were on trial? Suppose somebody accused me. Would I want to be judged by whether or not I was popular? Wouldn't I want to be judged on what was true as opposed to what might be popular? Think of Socrates: 500 Athenians voted to condemn him. We have a different system. And our system is based upon what you described as neutrality and independence.

Justice Kennedy: Our system presumes that there are certain principles that are more important than the

temper of the times. And you must have a judge who is detached, who is independent, who is fair, who is committed only to those principles, and not public pressures of other sort. That's the meaning of neutrality.

Justice Breyer: I'll give you an example if you want because I often get the question, "Well didn't you go through a confirmation process?" And in that confirmation process, I sat for 17 hours in front of a senate judiciary committee. I mean maybe 17 hours and 30 minutes, who's counting? But they asked me questions and I had to answer. And it was on television . . . If they were listening and they decided they didn't like what they saw they might communicate with their elected representatives. And perhaps I wouldn't have been confirmed. Well what did I think about that? I thought that that was an effort to inject a popular element, a democratic element into the selection of a person who, once he is selected and confirmed, is beyond electoral control. Now why do we have such a system? Because, on the one hand, people, when they think about it, want judges to be independent. Nobody wants a judge to be subject to the political whim of the moment. At the same time, we do live in a democracy. And for that reason I think it is appropriate to have some element of public control. And that element of public control in the federal system is introduced through the confirmation process and the selection process. But once the person is selected, at that point that person is independent.

Bill Moyers: Do you think that people who make contributions to judicial elections want those judges to be independent?

Justice Breyer: I don't know. I imagine some may, some may not. I don't know. It's a question of degree. You can have many different selection systems, but the bottom line has to be a system that, once the judge takes office that judge will feel that he or she is to decide the case without reference to the popular thing or the popular will of the moment.

Bill Moyers: Go back to the confirmation example, for a moment. Do you think the senators wanted you to be independent?

Justice Kennedy: Were they asking questions of Justice Breyer and of me and of our colleagues in order to determine how they would vote on a particular issue? Or were they asking instead to probe the temperament, the judicial qualities, the scholarship of the nominee? I hope it's the latter.

Justice Breyer: It is the latter, it is the latter . . . They're selecting the person because they think that person will be all right, and they believe and want, once that person is selected, that [the judge] should be independent. I mean, years ago, we heard Russian judges – I did once at a conference – and they were talking about what's called "telephone justice." And telephone justice is where the party boss calls you up on the telephone and tells you how to decide the case. So they said, Well, don't you have that in the United States? Now, really don't you? So I said, No. And I looked around and I said, Well I know you're thinking that even if we did, I would say no. They said, That's right. And I said, Well how can I explain it? It's just that no one in the United States wants that kind of system and it would be outrageous and beyond belief that someone would call up on the phone.

Bill Moyers: The concern that each of you expressed last year in Philadelphia was in particular about campaign contributions to judicial races. Why do you see that as a threat to independence and neutrality?

Justice Kennedy: Well, in part, it's because the campaign process itself does not easily adapt to judicial selection. Democracy is raucous, hurly-burly, rough-and-tumble. This is a difficult world for a jurist, a scholarly, detached neutral person to operate within. So, the whole problem of judicial campaigns is . . . difficult for us to confront. Now, when you add the component of this mad scramble to raise money and to spend money, it becomes even worse for the obvious reason that we're concerned that there will be either the perception or the reality that judicial independence is undermined.

Bill Moyers: Let me just give you some statistics from a poll conducted by the Texas state supreme court and the Texas state bar association, which found that 83% of the public think judges are already unduly influenced by campaign contributions. 79% of the lawyers who appear before the judges think campaign contributions significantly influence courtroom decisions. And almost half of the justices on the court think the same thing. Isn't the verdict in from the people that they cannot trust the judicial system there any more?

Justice Kennedy: This is serious, because the law commands allegiance only if it commands respect. It commands respect only if the public thinks the judges are neutral. And when you have figures like that, the judicial system is in real trouble. And that's why we should have a national conversation about it.

Justice Breyer: I agree completely. Independence doesn't mean you decide the way you want. Independence means you decide according to the law and the facts. The law and the facts do not include deciding according to campaign contributions. And if that's what people think, I couldn't agree with you more. The balance has tipped too far, and when the balance has tipped too far, that threatens the institution. To threaten the institution is to threaten fair administration of justice and protection of liberty.

Bill Moyers: Our research shows that the contributions to judicial elections around the country are increasing at a faster percentage than contributions to presidential and congressional races. What do you make of that?

Justice Breyer: I think it's a very good idea to try to look into it empirically. As you know the federal judges are not elected. We are selected, but I grew up in California and in San Francisco and there was a system of electing judges. But it was pretty unusual to find an instance where the position was contested let alone find an instance where there was a lot of campaign money.

Bill Moyers: There was a pre-selection process.

Justice Breyer: Well, just that there would be somebody in the office and the voters – it was more or less an understanding in the entire community, as long as that person was doing a good job on the merits, nobody was going to run against him. And the problem is once you get into this campaign business and begin to have a lot of money, then the person on the bench begins to think – what's going to happen if I decide the case this way or that way? Or at least the public sees it that way.

Justice Kennedy: Decades ago there was an old boy network. And like most old boy networks it worked rather well . . . The bar defended its judges. The bar was unified. It was run by the old boy network. Things have changed. They should have changed. We shouldn't have an old boy network. The problem is the bar itself has become fractionated. You have plaintiffs attorneys, you have defense attorneys. So there is no unified bar that will protect a particular judge who has made a courageous decision that's unpopular.

Bill Moyers: We actually talked to a lobbyist in Texas on record, on camera, willing to go on camera to talk about how – it's a lobbyist for the Texas Medical Association who boasted that he had succeeded in reshaping the philosophy of the Texas supreme court through an all-out political campaign and very large donations. They took [control of the court] from the trial lawyers who had been making contributions and had influenced the court to the other side of the, of the aisle. What does that say about the perception of independence?

Justice Breyer: I think it shows that if you have one group of people doing it, you'll get another group of people doing it. And if you have *A* contributing to infect, to affect a court one way, you'll have *B* trying the other way. And you'll have *C* yet a third way and pretty soon you'll have a clash of political interests. Now, that's fine for a legislature. I mean that's one kind of a problem. But if you have that in the court system, you will then destroy confidence that the judges are deciding things on the merits . . . And as I said our liberties are connected with that.

Justice Kennedy: But when you carry over the political dynamic to the election, fair takes on a different

meaning. In the political context fair means somebody that will vote for the unions or for the business. It can't mean that in the judicial context or we're in real trouble . . . To begin with, we have to ask, Is it fair for the electorate to try to shape the philosophy at all, without campaign contributions? Is this a proper function? I am concerned about that. I do not think that we should select judges based on a particular philosophy as opposed to temperament, commitment to judicial neutrality and commitment to other more constant values as to which there is general consensus . . .

Bill Moyers: I was struck by something you said in Philadelphia, last year. You said that it's wrong for attorneys to make contributions to judicial candidates and expect favorable rulings in return. But would a lawyer make a contribution to a judicial campaign without expecting something? That's not human nature to give without expecting something back.

Justice Kennedy: But the law is a profession and lawyers are committed to uphold the constitutional system and the independence of the judiciary. And I adhere to my statement. If an attorney gives money to a judge with the expectation that the judge will rule in his interest or his client's interest, that is corrosive of our institutions. It's corrosive of judicial independence.

Justice Breyer: Once you're in a system where there are contributions being made, it's certainly not the case that everybody expects something back. I mean those people who are interested in good government will certainly contribute in order to make certain there's some counter-balance to those whose interests in good government is less.

Justice Kennedy: You're hypothesizing the neutral eleemosynary donor. I hope they exist.

Justice Breyer: I think they do.

Justice Kennedy: I'm not sure . . .

Bill Moyers: Even at the local level some judicial candidates have to raise $250,000 to win and spend a great deal of time not only raising money but making television commercials, being coached by media advisors to walk into the room and look judicial. Now what does this do to the process?

Justice Breyer: It demeans the process. We all know there are other countries where, for various reasons, the public lacks confidence in the judiciary . . . And where those things have happened, I think there have been bad results for the people who live in the country, not just for the judges, not just for the lawyers, but for the ordinary man and woman who lives in the country. There tends not to be a method of fairly resolving disputes. And that means that it's harder to develop businesses. It's harder to just live an ordinary life in a fair way and it's harder to protect liberty.

Bill Moyers: Have you given any thought to what we could do about this?

Justice Kennedy: First, I hope that there will be enough of a concern by all segments of our community about protecting the independence of the courts that people will seriously consider trying to improve the election climate. That's the first thing. Second, I think the bar association ought to return to its earlier neutral professional attitude. Third, I think other civic groups and the media ought to do the same thing . . . If we could somehow

use elections to educate the public on the meaning of judicial independence, then we could take what is a flaw and turn into a strength, what is a disadvantage and then turn it into advantage.

Justice Breyer: Ultimately, the question of campaign contributions will be decided by the public. We do it in a democracy. Every citizen has to figure out what kind of government he or she wants. The most that we can say is that there is a problem and we hope you'll think about it . . . And we trust that if people do think about it, they'll come to better solutions . . .

Bill Moyers: I respect your respect for the public, but I have to say that in states like Louisiana and Texas, where we've been reporting, the public stake in, and awareness of, and involvement in, judicial campaigns is being submerged to the sheer flood of contributions that are coming in. So that the public is less and less aware of what's happening behind the scenes.

Justice Breyer: Judges can't easily defend themselves. We can speak about the institution, but ultimately the bar is the group that both is in touch with the public on the one hand and understands the judicial institution on the other. And I had hoped that the bar associations would take the lead and try and think about the problem and educate the public . . .

Justice Kennedy: Most of the contributions that you're talking about are by entities that are interested in the civil law, the economic interests . . . [But] the criminal judge has no basic constituency to support him or her if they are obeying the law and are doing their job in the right way. And so when there's a contested election it then becomes, Who's tougher on crime? And this is very unfortunate

because it distorts the idea of judicial independence. A judge sometimes must release a criminal. He doesn't like it, she doesn't like it, but the law requires it. And the context of an election in which you are "soft on crime" betrays a misunderstanding of the judicial process and a misunderstanding of the constitution.

Justice Breyer: And supposing the person didn't do it? It doesn't help to fight crime to put people in prison who are innocent. And if a judge is going to be criticized for letting off a person and it turns out that person was innocent, that would be a pretty bad criticism. Or suppose the person didn't have a lawyer. Well it's fairly important that everyone have a lawyer and so we have a system that you can't convict a person without a lawyer, even if he's guilty. Well the judge might stand up for that principal, which he has to do under the law. And it would be a pity if because he stood up for the correct constitutional principle or decided that a person was innocent, wouldn't be convicted, that some opponent, through a set of advertisements took his job away. That's the problem.

Bill Moyers: Do you think we're losing qualified people because of this system?

Justice Kennedy: I have no recent studies or empirical basis on which to answer that question . . . We so far, I think, are very lucky. There are some real heroes in the state judicial system, some marvelous judges, who know the law, who love the law, who are serving there for the right reason.

Justice Breyer: I completely agree with Justice Kennedy, and particularly the last comment, because often I used to tell students who come to the court – You'll read in the newspaper about the Supreme Court of the United

States. You will read in the newspaper more often about federal courts, but the law that affects people, the trials that affect human beings are by and large in the state courts. That's the bread and butter of the judicial system. Those are the judges who decide where the child should go in the case of divorce. Those are the judges that deal with 90% of the crime. Those are the judges that deal with a person's house, with a person's car, with everything that means something to an individual family. And they don't get lots of publicity and they don't get a lot of salary either. And life in some of those courts is not so easy for the judges. And the walls may have a few cracks and the telephone may not work, and they may have a hard time getting their case recorded because the word processor – well, they don't have one . . .

Bill Moyers: Do you think that this is a critical moment for examining judicial elections?

Justice Kennedy: A commitment to the constitution is not something that's genetic, it's not inherited, it's not automatic. It has to be taught. And each generation must learn about the constitution and the values of constitutional institutions within the context of their own time, within the environment of their own time. And if we are in an era in which there is a loss of confidence in the judicial system – and, even worse, a misunderstanding of the judicial system – then we must take steps to correct it. I do sense that there is a growing misunderstanding, a growing lack of comprehension, of the necessity of independent judges . . . There must be a rededication to the constitution in every generation. And every generation faces a different challenge. We weren't talking about this 30 years ago, because we didn't have money in elections. Money in elections presents us with a tremendous challenge, a

tremendous problem and we are remiss if we don't at once address it and correct it . . .

Bill Moyers: Well you remind me of what the historian Plutarch said in the Roman Republic: "The abuse of buying and selling votes crept in and money began to play an important part in determining elections. Later on, this process of corruption spread to the law courts. And then to the army, and finally the Republic was subjected to the rule of emperors."

Justice Breyer: There are loads of countries that have nice written constitutions like ours. But there aren't loads of countries where they're followed. And the reason that they're followed here is not simply because of the judges. It's because of the Civil War. It's because after 80 years of segregation you had a decision of *Brown v Board* that said people will be treated equally. And then many years before that became real, and gradually over time, 270 million people have learned roughly the importance of following that constitution and following that law. It's complicated. It's called habit. It's called respect for the constitution, and it's called respect for the institution of the judiciary. And that grows slowly. People have to be educated and they have to stick to it. If people lose that respect, an awful lot is lost.

(4)

No. 06-53

Supreme Court, U.S.
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In The
Supreme Court of the United States

MR. JEFFREY F. JONES,

Petitioner,

v.

THE HONORABLE JANET R. BURNSIDE, JUDGE,

and

THE HONORABLE THOMAS J. MOYER, CHIEF JUSTICE,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

PETITION FOR REHEARING

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PETITION FOR REHEARING

The Petitioner, Mr. Jeffrey F. Jones, respectfully moves this Supreme Court of the United States for an order (1) vacating its denial of his Petition for a Writ of Certiorari, heard in Conference on September 25, 2006 and entered on October 2, 2006, and (2) granting his Petition.[1]

As grounds for this Motion, which are "limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented," U.S. SUP. CT. R. 44.2, the Petitioner states the following:

On the front page of the Sunday, October 1st, New York Times, it was reported, in part, as follows:

> Thirty-nine states elect judges, and 30 states are holding elections for seats on their highest

[1] In his Petition for a Writ of Certiorari, the Petitioner respectfully prayed for this Court to grant a writ of certiorari to review the Ohio Supreme Court's refusal to disqualify the Trial Court from presiding over his underlying and pending legal malpractice case against the Defendants. Petition for a Writ of Certiorari, at 1, 30. The Petition was filed July 10, 2006, it was received by the Clerk of this Court on July 12th, and it was docketed on July 13th. The Petition was served on the Respondents and Underlying Defendants by Federal Express, and it was delivered to all of them on July 11th. The Petitioner notified the Respondents and Underlying Defendants of the docketing of the same, on the forms provided by the Clerk's office, by United States First-Class Mail on July 17th (the same day he received the same from the Clerk's office). On July 24th, the Petitioner filed a Supplemental Brief in regards to why the Petition is not moot. On August 14th, the Chief Justice of the Ohio Supreme Court filed his Waiver of his Right to Respond to the Petition. On September 19th, the Petitioner filed a Second Supplemental Brief. To date, the Trial Court has made no filing herein.

courts this year. Spending in these races is skyrocketing, with some judges raising $2 million or more for a single campaign. As the amounts rise, questions about whether money is polluting the independence of the judiciary are being fiercely debated across the nation. And nowhere is the battle for judicial seats more ferocious than in Ohio.

An examination of the Ohio Supreme Court by The New York Times found that its justices routinely sat on cases after receiving campaign contributions from the parties involved or from groups that filed supporting briefs. On average, they voted in favor of contributors 70 percent of the time. Justice O'Donnell voted for his contributors 91 percent of the time, the highest rate of any justice on the court.

In the 12 years that were studied, the justices almost never disqualified themselves from hearing their contributors' cases. In the 215 cases with the most direct potential conflicts of interest, justices recused themselves just 9 times.

Even sitting justices have started to question the current system. "I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race," said Justice Paul E. Pfeifer, a Republican member of the Ohio Supreme Court. "Everyone interested in contributing has very specific interests."

"They mean to be buying a vote," Justice Pfeifer added. "Whether they succeed or not, it's hard to say."

Three recent cases, two in Illinois and one in West Virginia, have put the complaints in sharp focus. Elected justices there recently refused to

> disqualify themselves from hearing suits in which tens or hundreds of millions of dollars were at stake. The defendants were insurance, tobacco and coal companies whose supporters had spent millions of dollars to help elect the justices.
>
> After a series of big-money judicial contests around the nation, the balance of power in several state high courts has tipped in recent years in favor of corporations and insurance companies.
>
> In the 2002 Ohio judicial election, for example, two candidates won seats that year on the seven-member court after each raised more money than one of the candidates for governor that year.

Adam Liptak & Janet Roberts, *Tilting the Scales? The Ohio Experience: Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A-1;[2] *see also* Adam Liptak, *Case Studies: West Virginia and Illinois*, N.Y. TIMES, Oct. 1, 2006, at A-21 (discussing examples from those states);[3] *see generally*, Opinion, *Judicial Politics Run*

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[2] Article available at http://select.nytimes.com/search/restricted/article?res=F50C16F93C540C728CDDA90994DE404482.

The photographs and graph from the article are not available online. Searching the New York Times database will allow one to pull up a table of the justices' rulings on their contributors' cases, where one can click on any individual justice and see a listing of those cases, contributors, and amounts, but there is no observable web address for this link. Ditto for a video presentation by the lead author.

[3] Article available at http://select.nytimes.com/search/restricted/article?res=F10A16F93C540C728CDDA90994DE404482.

In the case of *Avery v. State Farm Mutual Automobile Insurance Co., cert. denied*, 126 S. Ct. 1470 (2006), which was one of the Illinois

(Continued on following page)

Amok, N.Y. TIMES, Sept. 19, 2006, at A-24 (arguing that high spending and special interest involvement in judicial campaigns undermine public respect and confidence in the judiciary).[4]

The Ohio State Bar Association responded to this article by saying that the "Association would like to see consideration of stronger recusal and/or disqualification provisions that would be triggered when campaign contributions reach certain levels, subject to waiver by mutual consent of the parties." Press Release, Oh. St. B. Ass'n, Oct. 5, 2006 (statement of President John S. Stith).[5]

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cases, this Court denied certiorari on March 6, 2006. There are many reasons why this Court may have chosen to decline *Avery*: (1) There was no disqualification motion made in *Avery*, there was only a conditional recusal motion made, and the rehearing thereof was held to be moot (in this Case, both motions were made directly); (2) There was no evidence in *Avery* that the party, itself, had made the contributions, only that its agents and employees had made the contribution (in this Case, it is uncontested that the opposing party made the contributions); (3) *Avery* was a very complicated case, where the allegation was that the state supreme court justice at issue was decisive on only part of the underlying opinion (in this Case, there has not yet been a final outcome, and this Court could focus squarely on the ethical issues); and (4) *Avery* did not argue ABA Mode Code of Judicial Conduct Canon 3(E)(1)(e) or explain the ABA's position on this topic (obviously, that is squarely at issue in this Case). Apart from the huge amount of money involved in *Avery*, it was not a good test case for creating a recusal/disqualification standard based upon campaign contributions, for the above-stated reasons and many more, including the fact that the petitioner did not argue that case from a judicial ethics perspective, and he did not cite to the voluminous judicial ethics secondary authority, the ABA's position under its current MCJC, or the ABA's forthcoming revision thereof.

[4] Opinion available at http://select.nytimes.com/search/restricted/article?res=F60616FB3B550C7A8DDDA00894DE404482.

[5] Press Release available at www.ohiobar.org/pubs/insideosba/?articleid=876.

In declining to grant certiorari in this Case, this Court has ignored the fundamental due process deprivations being experienced in Ohio and nationally in favor of leaving the political question of how judges should be chosen to the states to deal with – even though these are separate issues. This makes no sense, because this Court has repeatedly held that "due process requires a 'neutral and detached judge in the first instance. . . .'" *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617 (1993) (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972)); *see also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (discussing requirement of neutrality). As demonstrated by the New York Times, clearly this due process requirement is not being met in Ohio and elsewhere. This Court does not have to answer the political question in order to protect litigants' due process rights via a recusal/disqualification standard related to campaign contributions.

From a macro level, this Court could well leave it to the citizens of Ohio and the other states to clean up this mess, but from the micro level, hundreds, thousands, or millions, of litigants in Ohio and elsewhere have been, are being, or will be, subjected to judges biased and prejudiced against them due to campaign contributions, which amounts to an incalculable denial of due process across the board. *See* Petitioner's Supplemental Brief, at 8-10 (discussing why this Case is clearly capable of repetition, yet otherwise evading review, if this Case were otherwise deemed moot); Petitioner's Second Supplemental Brief, at 5-7 & n.13 (discussing why the incumbent chief justices have no incentive to adopt reform); *see also* Amanda Bronstad, *Cash Is Flowing in Judicial Elections*, NAT'L L.J., Oct. 9, 2006 (discussing the effect of this Court's

White decision on increasing money in judicial elections);[6] Kimberly A. Strassel, *Corporate America Takes on Spitzerism*, WALL ST. J., Sept. 25, 2006, at A-14 (discussing the National Association of Manufacturers' American Justice Partnership, which is designed to coordinate the campaign funding and strategy of pro-business state supreme court candidates).

Ignoring litigants' due process rights, while turning a blind eye to the erosion of judicial independence caused by the lack of a recusal/disqualification standard related to campaign contributions, is inconsistent with this Court's past and current statements regarding threats to judicial independence. *See* Petitioner's Petition for a Writ of Certiorari, at 20-26; Supplemental Brief, at 8-10; Second Supplemental Brief, *passim*; *see also* Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A-18 (discussing same); *see generally* Tony Mauro, *Roberts Makes Strong Plea for Judicial Independence: Chief Justice and Attorney General, as well as Justice Breyer, Sound a Clarion Call for Judicial Independence*, LEG. TIMES, Oct. 20, 2006 (reporting on the *Fair and Independent Courts: Conference on the State of the Judiciary*, Sept. 28-29, 2006, held at Georgetown Law Center, Washington, D.C.);[7] Michael Scholl, *Alito Says Level of Attacks on Judges Hits Historic High*, N.Y. L.J.,

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[6] Article available at www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1160125529678.

[7] Article available at www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1159693520619; conference materials are available at www.law.georgetown.edu/judiciary.

Oct. 2, 2006 (reporting on speech where Justice Alito "stress[ed] the importance of judicial independence").[8]

CONCLUSION

In conclusion, and for the foregoing reasons, as well as those contained in the Petition for a Writ of Certiorari and Supplemental Briefs, the Petitioner prays that this Supreme Court of the United States grant rehearing of the order of denial, vacate that order, and grant the Petition and review the judgment and opinion below.

Respectfully submitted,

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[8] Article available at www.law.com/jsp/nylj/PubArticleNY.jsp?id=1159520730064.

CERTIFICATE OF COUNSEL

As counsel for the Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in U.S. Supreme Court Rule 44.2.

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